Certiorari

Supreme Court of the United States

OCTOBER TERM, 1938

No. 550

BETHLEHEM STEEL COMPANY, PETITIONER,

vs.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

PETITION FOR CERTIORARI FILED JANUARY 13, 1939.

CERTIORARI GRANTED JANUARY 16, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 590

BETHLEHEM STEEL COMPANY, PETITIONER,

vs.

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Index No. 24334—1937

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Plaintiff-Appellant,

against

BETHLEHEM STEEL COMPANY, Defendant-Respondent

STATEMENT UNDER RULE 234

This is an appeal from the order of Mr. Justice Samuel I. Rosenman made and entered in the office of the Clerk of the County of New York on the 9th day of December, 1937, which granted plaintiff's motion for summary judgment against the defendant-respondent only to the extent of the amount admitted to be due by said defendant-respondent and dismissed the complaint in respect to plaintiff-appellant's claim in excess of that amount, and from the final judgment entered thereon in the office of the Clerk of the County of New York on the 16th day of December, 1937.

The action was commenced on April 10, 1937, by acceptance of service of a copy of the summons and complaint by the attorneys for defendant-respondent. Issue was joined on June 1, 1937, by service of defendant-respondent's amended answer.

[fol. 2] Plaintiff-appellant appeared by Messrs. Miller, Owen, Otis & Bailly, as its attorneys.

Defendant-respondent appeared by Messrs. Cravath, deGersdorff, Swaine & Wood, as its attorneys.

There has been no change of parties or attorneys, except that the order entered December 9, 1937, severed this action as against Lackawanna Steel Company and Bethlehem Iron Mines Company, which were parties defendant in the court below, and plaintiff-appellant does not appeal from that part of said order.

IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

Index No. 24334—1937

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Plaintiff,

against

BETHLEHEM STEEL COMPANY, Defendant

NOTICE OF APPEAL TO APPELLATE DIVISION

Please take notice that the plaintiff above named hereby appeals to the Appellate Division of the Supreme Court for the First Department from the final judgment entered [fol. 3] herein in the office of the Clerk of the County of New York on the 16th day of December, 1937, and the plaintiff also appeals to said Appellate Division from the order of Mr. Justice Samuel I. Rosenman herein, made and entered in the office of the Clerk of the County of New York on the 9th day of December, 1937; and the plaintiff hereby appeals from each and every part of said judgment and order except so much of the order as directs that this action be severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company.

Dated, New York, N. Y., December 29, 1937.

Yours, etc., Miller, Owen, Otis & Bailly, Attorneys for Zurich General Accident & Liability Insurance Company, Ltd., 15 Broad Street, New York, N. Y.

To Messrs. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, 15 Broad Street, New York, N. Y.
Andrew B. Keating, Esq., Acting clerk of New York County.

[fol. 4] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

ORDER APPEALED FROM—December 9, 1937

The plaintiff in the above-entitled action, having made a motion for an order striking out the amended answer of the defendant Bethlehem Steel Company on the ground that there is no defense to the action and for judgment for the

plaintiff against the defendant Bethlehem Steel Company for the relief demanded in the complaint, pursuant to Rules 113 and 114 of the Rules of Civil Practice, and for such other and further relief as to this Court might seem just and proper and for the costs of this motion;

[fol. 5] And said motion having duly come on to be heard at a Special Term, Part I, of this Court, on the 24th day of September, 1937;

And upon the hearing of said motion, the attorneys for the plaintiff having tendered to this Court all of the coupons upon which the causes of action set forth in the complaint are based;

And the attorneys for the plaintiff and the attorneys for the defendant Bethlehem Steel Company having stipulated at the hearing of said motion, with the consent and approval of this Court, that all of said coupons were presented to this Court in support of the motion, that said coupons be returned to the possession of the attorneys for the plaintiff, and that the marking of them as exhibits in evidence and the depositing of them with and under the order of this Court at the time of said hearing pursuant to Rule III, subdivision 8, of the Rules of this Court for Special Terms, be waived;

And the attorneys for the plaintiff and the attorneys for the defendant Bethlehem Steel Company having stipulated that the Mortgage Indenture dated February 16, 1910, from Lackawanna Steel Company to Union Trust Company of New York securing the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, payable March 1, 1950, be deemed to be before the Court as part of the moving papers on said motion;

And the defendant, Bethlehem Steel Company, having contended, *inter alia*, that Public Resolution No. 10 of the 73rd Congress of the United States, adopted June 5, 1933, was determinative of the issues contained in the pleadings in favor of the defendant; and the plaintiff having contended, *inter alia*, that said Public Resolution No. 10 of the 73rd Congress of the United States, did not affect the rights [fol. 6] of the plaintiff to the relief demanded in the complaint herein, and that if said Resolution were construed as affecting said rights, then to that extent said Resolution is unconstitutional in that it offends and is contrary to the Fifth Amendment of the Constitution of the United States

and is in excess of the powers granted to the Congress of the United States by said Constitution;

Now, on reading and filing the complaint and the amended answer of the defendant Bethlehem Steel Company, the notice of motion dated September 14, 1937, with proof of the due service thereof, the affidavit of William W. Miller, sworn to September 14, 1937, with Exhibits A and B annexed thereto, the affidavit of A. Sprecher, sworn to July 29, 1936, with Exhibit A annexed thereto, three affidavits of J. Hunsperger, sworn to, respectively, September 9, 1936, April 26, 1937, and July 15, 1937, with Exhibit A annexed to the first mentioned of said three affidavits, the affidavit of George L. LeBlanc, sworn to September 14, 1937, and two affidavits of Redmond F. Kernan, Jr., sworn to, respectively, September 14, 1937, and September 23, 1937, all in support of said motion; and on reading and filing the affidavit of William J. Brown, sworn to September 17, 1937, with Exhibits A and B annexed thereto, the affidavit of William F. Majory, sworn to September 22, 1937, and the affidavit of Robert D. Blasier, sworn to September 22, 1937, all in opposition to said motion; and upon all the papers and proceedings heretofore had herein, and after hearing Redmond F. Kerman, Jr., Esq., of counsel for the plaintiffs, in support of said motion, and William D. Whitney, Esq., of counsel for the defendant Bethlehem Steel Company, in opposition thereto, and due [fol. 7] deliberation having been had thereon, and upon filing the opinion of the Court, and this Court having determined that the amount owing by the defendant Bethlehem Steel Company on the coupons sued upon is only the number of dollars specified in said coupons, namely, $25 per coupon, it is

Ordered that said motion be, and the same hereby is, granted to the extent, but only to the extent, of directing, and it is hereby directed, that final judgment be entered herein in favor of the plaintiff and against the defendant Bethlehem Steel Company for the amount in dollars expressed to be payable on the 1132 coupons sued upon in the first cause of action and the 323 coupons sued upon in the second cause of action, to wit, the sum of $28,300 on the first cause of action and the sum of $8,075 on the second cause of action; together with the costs and disbursements of the action; and it is

Further Ordered that the complaint be, and it hereby is, dismissed as against the defendant Bethlehem Steel Com-

pany in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon and in respect to its claim for damages in dollars in excess of $25.00 for each coupon, and that the final judgment to be entered herein provide to that effect; and it is

Further Ordered that this action be and the same hereby is severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company.

Enter.

S. I. R., J. S. C.

[fol. 8] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

Index No. 24334—1937

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Plaintiff,

against

BETHLEHEM STEEL COMPANY, Defendant

JUDGMENT APPEALED FROM

Plaintiff having moved for an order striking out the amended answer of the defendant Bethlehem Steel Company on the ground that there is no defense to the action and for judgment for the plaintiff against the defendant Bethlehem Steel Company for the relief demanded in the complaint pursuant to Rules 113 and 114 of the Rules of Civil Practice, and said motion having duly come on to be heard before Mr. Justice Samuel I. Rosenman at a Special Term, Part I of this Court on September 24, 1937, and Redmond F. Kernan, Jr., Esq., of Miller, Owen, Otis & Bailly, attorneys for the plaintiff, having appeared in support of said motion, and William D. Whitney, Esq., of Cravath, deGersdorff, Swaine & Wood, attorneys for the defendant, having appeared in opposition thereto, and the Court after due deliberation having made, entered and filed an order on the 9th day of December, 1937, granting said motion to the extent, but only [fol. 9] to the extent of directing that final judgment be entered herein in favor of plaintiff and against the defendant Bethlehem Steel Company for the amount in dollars expressed to be payable on the coupons sued upon, together with the costs and disbursements of the action; and dismiss-

ing the complaint against the defendant Bethlehem Steel Company in respect to the claim of the plaintiff of its right to receive 129.50 Swiss francs for each coupon and in respect to its claim for damages in dollars in excess of $25 for each coupon; and directing that this action be severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company; it is

Adjudged that the plaintiff Zurich General Accident & Liability Insurance Company, Ltd., of Zurich, Switzerland, have judgment against the defendant Bethlehem Steel Company, a Pennsylvania corporation having an office at 25 Broadway, City and State of New York, in the sum of $36,375; and it is

Further Adjudged that the plaintiff's complaint be, and the same hereby is, dismissed as against defendant Bethlehem Steel Company in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon subject of this action and in respect to its claim for damages in dollars in excess of $25 for each of said coupons.

Judgment entered this 16th day of December, 1937.

Andrew B. Keating, Acting Clerk. (Seal.)

[fol. 10] In Supreme Court of New York, New York County

[Title omitted]

Summons

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, March 24, 1937.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff,
Office and Post Office Address, No. 15 Broad Street,
New York, N. Y.

[fol. 11] IN SUPREME COURT OF NEW YORK

COMPLAINT

The plaintiff above named, appearing herein by Miller, Owen, Otis & Bailly, its attorneys, complains of the defendants and alleges on information and belief:

For a First Cause of Action:

First. At all times hereinafter mentioned the plaintiff was and still is a corporation organized and existing under and by virtue of the laws of the Republic of Switzerland, having its principal place of business in Switzerland.

Second. At all times hereinafter mentioned the defendant Lackawanna Steel Company was and, for the purposes of this suit, still is a corporation organized and existing under the laws of the State of New York.

Third. At all times hereinafter mentioned the defendant Bethlehem Iron Mines Company was and, for the purposes of this suit, still is a corporation organized and existing under the laws of the State of New York.

Fourth. At all times hereinafter mentioned the defendant Bethlehem Steel Company was and still is a foreign corporation, organized and existing under the laws of the State of Pennsylvania authorized to do business in the State of New York, with an office at No. 25 Broadway in the Borough of Manhattan, City, County and State of New York.

[fol. 12] Fifth. On or about the 1st day of March, 1910, in the City and State of New York, the defendant Lackawanna Steel Company duly made and, for value received, issued and delivered in coupon form its First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910, and due March 1, 1950. Attached to each of said bonds there were semi-annual interest coupons numbered from 1 to 80, inclusive, payable on the 1st day of March and the 1st day of September in each year during the term of said bond. By each of said coupons the defendant Lackawanna Steel Company promised that unless the bond to which said coupon was attached should have been called for previous redemption, it would pay to the bearer on the maturity date of said coupon at its office or agency in the City of New York,

United States of America, $25.00 United States gold, or in London, England, five pounds two shillings, ten and one-half pence sterling (£5.2.10-½), or in Frankfort-on-Main, Germany, one hundred and five marks (M. 105), or in Amsterdam, Holland, sixty-two (62) Guilders, or in France, one hundred twenty-nine and one-half (129.50) French francs, or in Belgium, one hundred twenty-nine and one-half (129.50) Belgian francs, or in Switzerland, one hundred twenty-nine and one-half (129.50) Swiss francs, being six months' interest then due on each of its respective First Consolidated Mortgage Gold Bonds, Series A, above-described. On the face of each of the above-described bonds, it is stipulated that payment of said interest is to be made at the office or agency of the Lackawanna Steel Company in the Borough of Manhattan, in the City of New York, State [fol. 13] of New York, or at other designated offices in the foreign cities and countries above mentioned. The office or agency, so designated and stated on the back of each of said coupons for payment in Switzerland, is at Schweizerische Kreditanstalt, in Zurich, Switzerland. A copy of the form of said coupons and of said bonds are hereto attached, marked respectively Exhibit "A" and Exhibit "B" and made a part hereof.

Sixth. On or about the 10th day of October, 1922, defendant Bethlehem Iron Mines Company under its former name Bethlehem Steel Company of New York, Inc., acquired by purchase the property of said Lackawanna Steel Company, as an entirety, and, for a valuable consideration and as part of the purchase price of the said property of Lackawanna Steel Company as an entirety, by an indenture dated October 10, 1922, between said defendant then known as Bethlehem Steel Company of New York, Inc., and Central Union Trust Company of New York, as trustee, for the benefit of said Trustee and for the benefit of the plaintiff as holder of the bonds and coupons mentioned and described in paragraph "Eighth" hereof, assumed the due and punctual payment of the principal and interest of said Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, and undertook to perform all of the terms and conditions thereof, and assumed the performance of all the covenants and conditions of the mortgage given to secure said bonds, and charged therewith the property and franchises so purchased from Lackawanna Steel Company.

[fol. 14] Seventh. On or about December 26, 1936, defendant Bethlehem Iron Mines Company was merged, by a Certificate of Merger, filed in the office of the Secretary of State of New York, with the defendant, Bethlehem Steel Company, a Pennsylvania corporation, under Section 85 of the New York Stock Corporation Law, and defendant Bethlehem Steel Company assumed all the liabilities and obligations of the merged Bethlehem Iron Mines Company and became liable therefor in the same manner as if defendant Bethlehem Steel Company had itself incurred such liabilities and obligations.

Eighth. Prior to the 1st day of September, 1934, plaintiff purchased for value 323 of the First Consolidated Mortgage Gold Bonds, Series A, of Lackawanna Steel Company referred to in paragraph "Fifth" hereof with all coupons numbered 49 maturing September 1, 1934 and all subsequent coupons attached thereto and plaintiff ever since has been, and now is, the lawful owner, holder and bearer of said 323 bonds and all of the coupons attached thereto numbered 49, 50, 51, 52 and 53 which matured, respectively, September 1, 1934, March 1, 1935, September 1, 1935, March 1, 1936 and September 1, 1936, except forty (40) coupons numbered 49, forty (40) coupons numbered 50 and forty (40) coupons numbered 51 which have heretofore been paid by defendant Bethlehem Iron Mines Company pursuant to a judgment of this Court. None of the 323 bonds above mentioned has been called for redemption.

Ninth. On the 15th day of July, 1936, the plaintiff caused to be presented at Schweizerische Kreditanstalt (Credit Suisse), the paying agents designated at Zurich, Switzer- [fol. 15] land, for the payment of the above-mentioned bonds and coupons each of 283 of said coupons numbered 49, each of 283 of said coupons numbered 50, each of 283 of said coupons numbered 51 and each of 283 of said coupons numbered 52, attached, respectively, to 283 of said 323 First Consolidated Mortgage Gold Bonds, Series A, of Lackawanna Steel Company referred to in paragraph "Eighth" hereof and caused payment to be duly demanded with respect to each of said 1132 coupons against the surrender thereof of 129.50 Swiss francs, or 146,594 Swiss francs, the aggregate amount which the defendant Lackawanna Steel Company agreed to pay and which the defendants Bethlehem Iron Mines Company and Bethlehem Steel Company

have assumed and agreed to pay in respect of said coupons, but the defendants neglected and refused to pay the said Swiss francs or the amount of said Swiss francs due on any of such coupons, and the said coupons being so dishonored were protested for non-payment.

Tenth. On the 15th day of July, 1936, when said coupons were presented at Zurich, Switzerland, as aforesaid, the market value in Zurich, Switzerland, in lawful money of the United States of $146,594 Swiss francs, payable in respect to said 1132 coupons, was $48,009.54, said Swiss francs on that day being of the market value of 32.75 cents per Swiss franc.

Eleventh. On the 1st day of September, 1934, when the 283 coupons numbered 49 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, [fol. 16] in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons, was $12,141.65, said Swiss francs on that day being of the market value of 33.13 per Swiss franc.

On the 1st day of March, 1935, when the 283 coupons numbered 50 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons, was $11,947.41 said Swiss francs on that day being of the market value of 32.60 per Swiss franc.

On the 1st day of September, 1935, when the 283 coupons numbered 51 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons was $11,929.08, said Swiss francs on that day being of the market value of 32.55 per Swiss franc.

On the 1st day of March, 1936, when the 283 coupons numbered 52 referred to in paragraph "Ninth" hereof matured, the market value in Zurich, Switzerland, in lawful money of the United States of 36,648.50 Swiss francs, payable in respect to said 283 coupons, was $12,116.00 said Swiss francs on that day being of the market value of 33.06 per Swiss franc.

Twelfth. There is now due and owing by the defendants to the plaintiff in respect to the 1132 coupons, the subject

of this First Cause of Action, the sum of $48,134.14, together with interest thereon from July 15, 1936, no part of which has been paid, although payment thereof has been duly demanded.

[fol. 17] For a Second Separate and Distinct Cause of Action:

Thirteenth. The plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "First", "Second", "Third", "Fourth", "Fifth" and "Sixth", "Seventh" and "Eighth" hereof as if herein fully set forth.

Fourteenth. On the 7th day of September, 1936, the plaintiff caused to be presented at Schweizerische Kreditanstalt (Credit Suisse), the paying agents designated at Zurich, Switzerland, for the payment of the above-mentioned bonds and coupons each of 323 coupons numbered 53, attached respectively to the 323 First Consolidated Mortgage Gold Bonds, Series A of Lackawanna Steel Company referred to in paragraph "Eighth" hereof, and caused payment to be duly demanded with respect to each of said 323 coupons against the surrender thereof of 129.50 Swiss francs, or 41,828.50 Swiss francs, the aggregate amount which the defendant Lackawanna Steel Company agreed to pay, and which the defendants Bethlehem Iron Mines Company and Bethlehem Steel Company have assumed and agreed to pay, in respect of said coupons, but the defendants neglected and refused to pay the said Swiss francs or the amount of said Swiss francs due on any of such coupons and the said coupons being so dishonored were protested for non-payment.

Fifteenth. On the 7th day of September, 1936, when said coupons were presented at Zurich, Switzerland, as aforesaid, the market value in Zurich, Switzerland, in lawful [fol. 18] money of the United States of 41,828.50 Swiss francs payable in respect to said 323 coupons, was $13,615.18, said Swiss francs on that day being of the market value of 32.55 cents per Swiss franc.

Sixteenth. On the 1st day of September, 1936, when the 323 coupons numbered 53 referred to in paragraph "Fourteenth" hereof matured, the market value in Zurich, Switzerland in lawful money of the United States of 41,828.50 Swiss francs payable in respect to said 323 coupons was

$13,631.90, said Swiss francs on that day being of the market value of 32.59 cents per Swiss franc.

Seventeenth. There is now due and owing by the defendants to the plaintiff in respect to the 323 coupons, the subject of this Second Cause of Action, the sum of $13,631.90, together with interest thereon from September 7, 1936, no part of which has been paid, although payment thereof has been duly demanded.

Wherefore, plaintiff demands judgment against the defendants in the sum of $61,766.04, together with interest on $48,134.14 thereof from July 15, 1936, with interest on $13,631.90 thereof from September 7, 1936, together with the costs and disbursements of this action.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff, Office and P. O. Address, 15 Broad Street, Borough of Manhattan, New York, N. Y.

(Verified by W. W. Miller, March 24, 1937.)

[fol. 19] EXHIBIT "A," ANNEXED TO COMPLAINT, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Form of Coupon

$25.

On the first day of ——, 19—, unless the bond hereinafter mentioned shall have been duly called for previous redemption, Lackawanna Steel Company will pay to the bearer at its office or agency in the City of New York, U. S. A., Twenty-five Dollars, United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M. Germany, M 105, or in Amsterdam, Holland, Gl.62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond Series A, No. —.

$25 U. S. Gold
£5.2.10½ Stg. Marks 105, Guilders 62 Francs 129.50

J. F. Higginson, Treasurer.

Reverse Side

Payable in New York, at the Company's office, London, at Speyer Brothers, Frankfort o/M, at Lazard Speyer-Ellissen, Amsterdam, at Teixeira De Mattos Brothers, Brussels, at Societe Generale De Belgique, Basel & Zurich, at Schweizerische Kreditanstalt.

[fol. 20] EXHIBIT "B," ANNEXED TO COMPLAINT, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

$1,000
U. S. Gold

£205.15.2 stg., M.4,200 D.R.W.
Guilders 2,480. Francs 5,180

UNITED STATES OF AMERICA,

State of New York

No. .....

Lackawanna Steel Company

Series A 5% Convertible Series A 5%

First Consolidated Mortgage Gold Bond
Due 1950

Lackawanna Steel Company (hereinafter called the Steel Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder of this bond, on the first day of March, 1950, One Thousand Dollars in gold coin of the United States of America, or in London, England, £205.15.2 Sterling, or in Frankfort o/M Germany, 4200 Reichmarks, or in Amsterdam, Holland, 2480 Guilders, or 5180 Francs, if paid in France, Belgium or Switzerland, and to pay interest on said principal amount from March 1, 1910, respectively in said respective currencies, at the rate of five per centum per annum, semi-annually, on the first days of March and of September in each year, upon presentation and surrender of the interest coupons hereto annexed, as they severally mature. Payment of the principal and interest of this bond will be made at the office or agency [fol. 21] of the Steel Company in the Borough of Manhattan, in the City of New York, State of New York, in gold coin of the United States of America of the standard of weight and fineness as it existed on March 1, 1910, or at other designated offices in said cities and countries respectively. Both the principal and interest of this bond are payable without deduction for any tax or governmental charge which the

Steel Company or the Trustee under the First Consolidated Mortgage hereinafter mentioned may be required to pay or to retain therefrom under any present or future law of the United States of America or of any state, county or municipality or other taxing authority therein.

This bond is one of an issue of coupon bonds of the Steel Company, known as its First Consolidated Mortgage Gold Bonds, limited to the principal amount of $35,000,000 bearing interest at not exceeding five per cent per annum, payable semiannually, and all issued and to be issued under, and equally secured by, a mortgage and deed of trust dated February 16, 1910, executed by the Steel Company to Union Trust Company of New York, as Trustee, hereinafter termed the First Consolidated Mortgage. For a description of the properties mortgaged and pledged, the nature and extent of the security, the rights of the holders of bonds, and the terms and conditions upon which the bonds are issued and are secured, reference is made to the First Consolidated Mortgage.

This bond is subject to redemption at the option of the Steel Company at a premium of five per cent and accrued interest, on March 1, 1915, or at any time thereafter, on sixty days' prior notice as provided in the First Consolidated Mortgage.

[fol. 22] This bond shall pass by delivery unless registered in the name of the owner on the books of the Steel Company, such registry being noted on the bond by the Steel Company. After such registry, no transfer shall be valid unless made on said books by the registered holder in person or by his attorney duly authorized, and similarly noted on the bond, but the same may be discharged from registry by a transfer thereon to bearer, and thereupon transferability by delivery shall be restored; but this bond may again, from time to time, be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery.

At the option of the holder or registered owner this bond may be converted at its face value, subject to the conditions and regulations prescribed in the First Consolidated Mortgage, into shares of the common stock of the Steel Company at $100 per share of $100 par value during the period beginning March 1, 1912, and ending February 28, 1922.

No recourse shall be had for the payment of the principal or interest of this bond or for any claim based thereon or in respect thereof or of the First Consolidated Mortgage, against any incorporator, stockholder, officer or director of the Steel Company either directly or through the Steel Company whether by virtue of any law or by the enforcement of any assessment or otherwise.

This bond shall not be valid or become obligatory for any purpose until it shall have been authenticated by the certificate of the trustee under the First Consolidated Mortgage hereon endorsed.

[fol. 23] In Witness Whereof, Lackawanna Steel Company has caused this bond to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed and to be attested by its secretary or an assistant secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereto, the first day of March, 1910.

Lackawanna Steel Company, by —— ——, Vice-President.

Attest: —— ——, Secretary.

IN SUPREME COURT OF NEW YORK

AMENDED ANSWER OF DEFENDANT BETHLEHEM STEEL COMPANY

The defendant Bethlehem Steel Company, by Cravath, deGersdorff, Swaine & Wood, its attorneys, for its amended answer to the complaint herein:

1. Admits that Lackawanna Steel Company, named in said complaint, formerly was, but denies upon information and belief that it now is, or at the time when this action was begun was, either for the purposes of this suit or otherwise, [fol. 24] a corporation organized and existing under the laws of the State of New York.

2. Admits that Bethlehem Iron Mines Company, named in said complaint, formerly was, but denies upon information and belief that it now is, or at the time when this action was begun was, either for the purposes of this suit or otherwise, a corporation organized, and existing under the laws of the State of New York.

3. Admits that on or about the first day of March, 1910, in the City and State of New York, said Lackawanna Steel Company duly made and, for value received, issued and delivered its First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910, and due March 1, 1950, and that attached to each of said bonds were interest coupons numbered from 1 to 80, inclusive, one of which was payable on the first day of each March and September during the term of said bond, unless, as to any of such coupons, such bond should have been duly called for redemption prior to the maturity date of such coupon. This Defendant admits that a copy of the form of such coupons is attached to the complaint and marked Exhibit A and that a copy of the form of such bond is attached thereto and marked Exhibit B; it refers to the bonds and coupons, respectively, for a statement of the terms thereof, respectively, and except as herein answered, denies each and every allegation contained in paragraph Fifth of said complaint.

4. Denies any knowledge or information sufficient to form a belief as to the allegation contained in paragraph Sixth [fol. 25] of said complaint that the indenture dated October 10, 1922, therein referred to was made for the benefit of the plaintiff as holder of the bonds and coupons mentioned and described in paragraph Eighth of said complaint, and denies the allegation contained in said paragraph Sixth that by said indenture Bethlehem Iron Mines Company therein referred to undertook to perform all the terms and conditions of said bonds.

5. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs Eighth, Ninth, Tenth and Eleventh of said complaint, and in the three unnumbered sections or paragraphs thereof following the paragraph thereof marked "Eleventh" except that this defendant denies that this defendant or said Lackawanna Steel Company or said Bethlehem Iron Mines Company neglected or refused to pay the amount of Swiss francs due on the coupons referred to in said paragraph Ninth, or any of them, and further denies that said coupons were dishonored.

6. Denies each and every allegation contained in paragraph Twelfth of said complaint except that this defendant admits that the sum of $48,134.14 mentioned in said paragraph has not been paid.

7. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs Fourteenth, Fifteenth and Sixteenth of said complaint except that this defendant denies that this defendant or said Lackawanna Steel Company or said Bethlehem [fol. 26] Iron Mines Company neglected or refused to pay the amount of Swiss francs due on the coupons referred to in said paragraph Fourteenth, or any of them, and further denies that said coupons were dishonored.

8. Denies each and every allegation contained in paragraph Seventeenth of said complaint, except that this defendant admits that the sum of $13,631.90, mentioned in said paragraph has not been paid.

For a first separate and complete defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

9. All of the bonds and coupons mentioned and referred to in paragraphs Eighth, Ninth and Fourteenth of said complaint were on and after June 5, 1933, owned by persons resident in the United States.

10. The Swiss franc referred to in said complaint at all times in said complaint mentioned was the gold monetary unit of Switzerland, the country mentioned in said complaint, and was in fact and was provided by the laws of Switzerland to be the equivalent of nine thirty-firsts (9/31) of a gram of fine gold. The interests which the plaintiff alleges that it has in said bonds and coupons were acquired by the plaintiff from residents of the United States with full notice and knowledge of Public Resolution No. 10 of the 73rd Congress entitled "A Joint Resolution to assure uniform value to the coins and currency of the United [fol. 27] States", approved June 5, 1933, with intent to evade the application of said Joint Resolution.

11. By reason of the provisions of Section 5 (b) of an Act of Congress entitled "An Act to define, regulate and punish trading with the enemy and for other purposes," approved October 6, 1917; of an Act of Congress entitled "An act to provide relief in the existing National Emergency in banking, and for other purposes," approved March

9, 1933; of Title III of an Act of Congress entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint stock land banks, and for other purposes", "Title III—Financing—And exercising power conferred by Section 8 of Article I of the Constitution: To coin money and to regulate the value thereof," approved May 12, 1933; of Public Act No. 87 of the Seventy-Third Congress known as "The Gold Reserve Act of 1934," approved January 30, 1934; of executive orders, proclamations and regulations made pursuant to such Acts, and by reason of Public Resolution No. 10 of the Seventy-Third Congress, entitled "A Joint Resolution to assure uniform value to the coins and currency of the United States," approved June 5, 1933, this defendant and said Lackawanna Steel Company and said Bethlehem Iron Mines Company, respectively, have not been at any time since June 5, 1933, and are not now, under [fol. 28] any obligation to make payment in Swiss francs of the interest called for by the coupons referred to in said complaint to the plaintiff.

For a second separate and partial defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

12. This defendant repeats and realleges each and every allegation contained in paragraphs 9, 10 and 11 of this answer with the same force and effect as if herein set forth at length.

13. If this defendant or said Lackawanna Steel Company or said Bethlehem Iron Mines Company was under any obligation upon the maturity of any of the coupons referred to in said complaint to pay said coupons in Swiss francs, they, respectively, were not, and have not since been, and are not now, under any obligation to make payment of the interest called for by said coupons to the plaintiff in Swiss francs exceeding the number equivalent at current rates of exchange on the maturity date of said coupons to the number of dollars, lawful money of the United States of America, specified in said coupons, viz.: Twenty-five dollars ($25) in payment of each such coupon.

For a third separate and complete defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

14. In and by the First Consolidated Mortgage of said Lackawanna Steel Company referred to in the First Consolidated Mortgage Gold Bonds, Series A, of Lackawanna [fol. 29] Steel Company mentioned in said complaint, and *by reference thereto* in said bonds made a part thereof, it was provided, in part, in Section 4 of Article Fourteen of said Mortgage as follows:

"In case any company shall be consolidated with or merged into the Steel Company as aforesaid, or in case the Steel Company shall be so consolidated with or merged into any other corporation, or in case of sale of the property of the Steel Company as an entirety, the corporation formed by such consolidation or into which the Steel Company shall have been merged, or to which such sale shall have been made, upon executing and causing to be recorded an indenture with the Trustee whereby such corporation shall assume the due and punctual payment of all the consolidated bonds and the performance of all the covenants and conditions of this indenture, and charge therewith the property and franchises so taken over, shall succeed to and be substituted for the Steel Company, with the same effect as if it had been named herein as the party of the first part hereto, * * *."

On October 10, 1922, the property of said Lackawanna Steel Company as an entirety was sold by said Lackawanna Steel Company to Bethlehem Iron Mines Company, referred to in said complaint, under its former name of Bethlehem Steel Company of New York, Inc., and as a part of the purchase price of said property of said Lackawanna Steel [fol. 30] Company as an entirety by an indenture dated October 10, 1922, between said Bethlehem Iron Mines Company, then known as Bethlehem Steel Company of New York, Inc., and Central Union Trust Company of New York, which was then the Trustee under and referred to in said Mortgage, as such Trustee, for the benefit of said Trustee, and of the holders for the time being of the bonds secured by said Mortgage, duly executed by said Bethlehem Iron and Steel Company under its said former name, and thereafter duly recorded, said Bethlehem Iron Mines Company

assumed the due and punctual payment of all the Consolidated Bonds issued under said Mortgage and the performance of all the covenants and conditions of said Mortgage, and charged therewith the property and franchises so taken over by said Bethlehem Iron Mines Company. Said Bethlehem Iron Mines Company, pursuant to said provisions of said Mortgage, thereupon succeeded to and was substituted for said Lackawanna Steel Company as the obligor under said Mortgage and in respect of the bonds issued under said Mortgage and secured thereby, including the bonds referred to in said complaint, with the same effect as if said Bethlehem Iron Mines Company had been named in said Mortgage as the party of the first part thereto and as the obligor in each of said bonds, and said Lackawanna Steel Company was thereby, and pursuant to said provision of said mortgage, released and discharged from all obligations and liability under said Mortgage and in respect of any and all of said bonds issued under and secured by said Mortgage.

[fol. 31] 15. On or about December 26, 1936, said Bethlehem Iron Mines Company, by a Certificate of Merger filed in the office of the Secretary of State of New York, was duly merged with this defendant pursuant to the provisions of Section 85 of the New York Stock Corporation Law, and this defendant assumed all the liabilities and obligations of the merged Bethlehem Iron Mines Company and became liable therefor in the same manner as if this defendant had itself incurred such liabilities and obligations, and said Bethlehem Iron Mines Company thereupon ceased to exist and was and is no longer liable upon or under obligation to pay the coupons referred to in said complaint, or any of them.

16. The plaintiff did not exercise or purport to exercise election to receive payment of the coupons referred to in the respective causes of action alleged in said complaint in Swiss francs until after the respective due dates of said coupons; thereby the option, if any, to demand payment thereof in Swiss francs or otherwise than in money of the United States lapsed, and this defendant and said Bethlehem Iron Mines Company have elected and this defendant, as the substituted and sole obligor on said coupons does now elect to pay each of said coupons in money of the United States in the amount of such money therein speci-

fied, but the plaintiff has not presented said coupons for payment in such money of the United States or surrendered or offered to surrender said coupons or any of them upon such payment thereof as provided in said bonds and said coupons.

[fol. 32] For a fourth separate and partial defense to each of the causes of action alleged in said complaint this defendant alleges upon information and belief:

17. This defendant repeats and realleges each and every allegation contained in paragraphs 14, 15 and 16 of this answer with the same force and effect as if herein set forth at length.

18. On the respective due dates of said coupons said Bethlehem Iron Mines Company, as the successor of said Lackawanna Steel Company by virtue of the provisions of said bonds and of said Mortgage and by virtue of said indenture with Central Union Trust Company of New York, as Trustee under said Mortgage, was ready, willing and able to pay said coupons as they respectively became due in money of the United States of America upon presentation and surrender of said coupons, respectively, at the office or agency of said Bethlehem Iron Mines Company in the City of New York in said United States as provided in said bonds and said coupons and in said Mortgage. If, notwithstanding that said coupons have not been presented for surrender and payment in said City of New York, this defendant, or any other corporation named as a defendant in said complaint, is liable herein upon said coupons in any amount, they, respectively, are not liable thereon in an amount in excess of the amount in lawful money of the United States of America specified in said respective coupons, viz., Twenty-five dollars ($25) in payment of each such coupon [fol. 33] and they, respectively, are not liable for interest on any such amount.

Wherefore, this defendant demands judgment dismissing the complaint herein with the costs and disbursements of this action.

Cravath, deGersdorff, Swaine & Wood, Attorneys for defendant Bethlehem Steel Company, No. 15 Broad Street, New York, N. Y.

[Verified by William J. Brown on May 29, 1937.]

IN SUPREME COURT OF NEW YORK

NOTICE OF MOTION FOR JUDGMENT

SIRS:

Please take notice that upon the complaint and amended answer herein and upon the affidavit of William W. Miller, sworn to the 1[illegible]h day of September, 1937, the affidavit of A. Sprecher, assistant manager of plaintiff, sworn to the 29th day of July, 1936 and the three (3) affidavits of J. Hunsperger, sworn to the 9th day of September, 1936, the 26th day of April, 1937 and the 15th day of July, 1937 respectively, and the affidavits of Redmond F. Kernan, Jr., and George L. LeBlanc, both sworn to the 14th day of September, 1937, which affidavits are annexed hereto, a motion will be made at a Special Term, Part I of this Court to be held in and for the County of New York, at the County Court [fol. 34] House, in the Borough of Manhattan, City and County of New York, on the 24th day of September, 1937, at the opening of the Court on that day or as soon thereafter as counsel can be heard, for an order striking out the amended answer of the defendant Bethlehem Steel Company on the ground that there is no defense to the action and for judgment for the plaintiff against the defendant, Bethlehem Steel Company, for the relief demanded in the complaint, or for so much of the plaintiff's claim as the defense of the defendant, Bethlehem Steel Company, does not apply to or as is admitted, on such terms as may be just, pursuant to Rules 113 and 114 of the Rules of Civil Practice, and for such other and further relief as to the Court may seem just and proper and for the costs of this motion.

Please take further notice that answering affidavits, if any, in respect to the above motion must be served upon the attorneys for the plaintiff five days before the return date thereof.

Dated, New York, N. Y., September 14, 1937.

Yours, etc., Miller, Owen, Otis & Bailly, Attorneys for Plaintiff, Office & P. O. Address, 15 Broad Street, Borough of Manhattan, City of New York.

To Cravath, deGersdorff, Swaine & Wood, Esqs., Attorneys for Defendants, 15 Broad Street, New York, N. Y.

[fol. 35] AFFIDAVIT OF WILLIAM W. MILLER, ANNEXED TO NOTICE OF MOTION, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

William W. Miller, being duly sworn, deposes and says:

I am a member of the firm of Miller, Owen, Otis & Bailly, attorneys of record for the plaintiff herein and I am familiar with all the proceedings had herein.

The summons and complaint in this action were served on the attorneys for the defendant, Bethlehem Steel Company, on April 10, 1937 and said attorneys accepted service thereof for said defendant and served an answer in its behalf on May 13, 1937 and an amended answer on June 1, 1937.

The summons and complaint were served on Lackawanna Steel Company on March 29, 1937. Said defendant's answer was served on May 13, 1937 and its amended answer on June 1, 1937.

The defendant, Bethlehem Iron Mines Company, has not been served.

The defendant, Bethlehem Steel Company, in paragraph 14 of its amended answer, concedes that the defendant, Bethlehem Iron Mines Company, under its former name, Bethlehem Steel Company of New York, Inc., by an indenture dated October 10, 1922 assumed the due and punctual payment of the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, dated March 1, 1910 and due March 1, 1950 and was substituted as the obligor [fol. 36] in respect to said bonds, including the bonds referred to in the complaint.

The defendant, Bethlehem Steel Company, in paragraph 15 of its amended answer, also concedes that by reason of the merger with it of the defendant, Bethlehem Iron Mines Company, on December 26, 1936, it assumed all the liabilities and the obligations of said Bethlehem Iron Mines Company.

This motion for summary judgment is made against the Bethlehem Steel Company only.

This is an action on a contract to recover a liquidated amount for damages for refusal to pay the number of Swiss francs specified in the bearer coupons of Lackawanna Steel

Company which were presented by plaintiff for payment at the agency of the defendants in Zurich, Switzerland.

Each of the coupons upon which this suit is brought was detached from one of the coupon bonds of defendant's predecessor, Lackawanna Steel Company, known as its First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910 and due March 1, 1950.

The affidavit of A. Sprecher, assistant manager of the plaintiff, dated July 29, 1936, and the three (3) affidavits of J. Hunsperger, assistant manager of the plaintiff, dated September 9, 1936, April 26, 1937 and July 15, 1937 respectively, set forth the facts as to the domicile and residence of the plaintiff, the purchase for value of the bonds from which the coupons at bar have been detached prior to the maturity of any of said coupons, the periods during which the purchases were made, the presentation to the paying agent of the defendants at Zurich, Switzerland, of said [fol. 37] coupons for payment in Swiss francs as specified in said coupons, the refusal of said payment, and the dishonoring of the coupons. Attached to the affidavit of A. Sprecher and the affidavit of J. Hunsperger dated September 9, 1936 are appropriate certificates of protest which state the reasons given by the paying agent of defendant as to why the coupons were dishonored.

The original coupons which are the subject of this action will be presented to the Court on the argument of this motion.

There are attached hereto as Exhibits A and B, and made a part hereof, copies of two letters dated January 11, 1934 and August 7, 1934 from Bethlehem Steel Corporation, the parent corporation, of defendants, which letters were sent to the New York Stock Exchange and published in its bulletins of January 13, 1934 and August 11, 1934, respectively. I am informed by representatives of the Amsterdam Stock Exchange and believe that the letter of August 7, 1934 became known in Europe on or about August 22, 1934 as stated in the affidavit of J. Hunsperger dated July 15, 1937.

In the first of these letters, the policies of the defendants in respect to the payment of the coupons is stated to be that the owners of bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto, will receive payment in such countries and in the currencies of such countries in the amount specified in such coupons for such countries. As regards the payment

of interest on bonds owned by those residing in the United States, it was announced in said letter that by reason of [fol. 38] Public Resolution No. 10 of the Seventy-third Congress, approved June 5, 1933, that said coupons would be paid only in lawful money of the United States in the amount specified in the coupons and not in any foreign currency.

In the letter of August 7, 1934, which, as above stated, I am informed became known in Europe on or about August 22, 1934, a change in the policy of the defendants was announced in respect to bonds owned by residents of foreign countries and there were imposed upon such foreign bondholders certain requirements, one of which was the submission with the coupons of an affidavit stating, among other things, that the bond or bonds from which the coupons were detached were owned by a bona fide resident of countries other than the United States continuously since June 5, 1933.

Deponent verily believes that there is no valid defense to this action, and that there is no triable issue presented by the defendant Bethlehem Steel Company's amended answer.

Wherefore, deponent respectfully prays that an order be made striking out said amended answer and that summary judgment be granted to the plaintiff and against the said Bethlehem Steel Company for the relief sought in the complaint, or for so much of plaintiff's claim as the defense of the defendant, Bethlehem Steel Company, does not apply to, or as is admitted, and that such other and further relief be granted as to the Court may seem just and proper, together with the costs of this motion.

(Sworn to by William W. Miller on September 14, 1937.)

[fol. 39] EXHIBIT "A", ANNEXED TO AFFIDAVIT OF W. W. MILLER, ANNEXED TO NOTICE OF MOTION, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Letter dated January 11, 1934 from Bethlehem Steel Corporation as published by the New York Stock Exchange in Bulletin of January 13, 1934.

"Letter has been received from Bethlehem Steel Corporation in regard to payment of coupons upon the following issues:

(1) The First Lien & Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942.

(2) The First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company, assumed by Bethlehem Iron & Steel Corporation, due March 1, 1950.

This letter is quoted in full below.

'Referring to your letter of December 8th, 1933, inquiring as to the policy to be followed with respect to the payment of coupons on certain bond issues expressed to be payable in foreign currencies:

There are two such issues of bonds issued or assumed by our subsidiary companies: (1) the First Lien and Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942, and (2) the First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company assumed by one of our subsidiaries, Bethlehem Iron and Steel Corporation, and due March 1, 1950.

The subject of your inquiry is an important one, not only [fol. 40] to us but to many other interests in this country, and on that account we have been giving a great deal of consideration to it, which has caused our delay in writing you.

The first thing we wish to have clearly understood is that Bethlehem intends fully to perform its obligations with respect to all its bonds. No one should get the contrary idea from the fact that we have not paid in foreign currencies coupons detached from bonds owned by residents of this country. The general question presented is: What are Bethlehem's obligations in respect of them? If, as we hereinafter indicate to be the case, Bethlehem is not legally bound to pay in foreign currencies any of the coupons from bonds owned in this country, then, of course, its officers cannot properly authorize the payment thereof in such currencies.

The apparent purpose of providing for payment of the interest on and the principal of such Bonds in foreign countries was to facilitate their sale and distribution in such countries by enabling residents of such countries who

might purchase any of such Bonds to collect such interest and principal at the respective maturity dates in such countries and in the currencies of such countries in specified amounts. In accordance with such purpose, we made or will make provision whereby owners of such Bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, have received or may receive payment thereof in such countries and in the currencies of such countries in the amount specified in such coupons for such countries.

[fol. 41] As regards the payment of the interest on such Bonds owned by those residing in the United States, we call your attention to Public Resolution No. 10 of the Seventy-third Congress, approved June 5, 1933, which among other things in substance declares that every provision in any obligation payable in money of the United States which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States or in an amount of money of the United States measured thereby is against public policy and provides that every such obligation (whether or not it contains any such provision) shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

Assuming this Resolution to be applicable to the above-mentioned Bonds, we must regard it as binding upon and the public policy thereby declared applicable to, all residents of the United States, including this Company.

Accordingly, we have paid and shall continue to pay, in accordance with their terms, matured coupons from the above-mentioned Bonds, owned by residents of the United States, in lawful money of the United States, upon presentation and surrender of such coupons at the office of Bethlehem, 25 Broadway, New York City; but the above-mentioned Resolution continuing in effect, we shall deem it our duty to decline to make payment in foreign countries of such coupons to residents of the United States in gold or in any foreign currency, unless and until it has been finally determined and that we are justified in making such payment.' "

[fol. 42] EXHIBIT "B", ANNEXED TO AFFIDAVIT OF W. W. MILLER, ANNEXED TO NOTICE OF MOTION, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

Letter Dated August 7, 1934, from Bethlehem Steel Corporation as Published by the New York Stock Exchange in Bulletin of August 11, 1934

"The following letter has been received from the Bethlehem Steel Corporation under date of August 7, 1934:

'Referring to my letter to you of January 11, 1934, regarding the payment in foreign countries of coupons for interest on the First Lien and Refunding Mortgage 5% Bonds, Series A, of Bethlehem Steel Company, due May 1, 1942, and the First Consolidated Mortgage 5% Bonds of Lackawanna Steel Company assumed by Bethlehem Iron and Steel Corporation and due March 1, 1950:

I am writing to advise you that the respective paying agents for such bonds in the respective foreign countries in which such bonds and the coupons appurtenant thereto are expressed to be payable are being authorized to make payment of such coupons in the currencies of such countries in the respective amounts stated in such coupons when and as such coupons shall be surrendered to such agents for payment in accordance with their terms, but only if such coupons shall be accompanied by

(1) An affidavit signed and sworn to by the owner of the bond or bonds from which such coupons were detached or by a duly authorized representative of such owner on a [fol. 43] date not more than twenty days prior to the date on which such coupons shall be so surrendered and showing:

(a) The number or numbers of the bond or bonds from which such coupons were detached;

(b) The name of the owner of such bond or bonds;

(c) That such owner is at the date of the making of such affidavit, and has been continuously for a period of six months prior to said date, a bona fide resident of a country or countries other than the United States of America; and

(d) That the bond or bonds from which such coupons were detached has or have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933; and

(2) In the case of a non-resident alien of the United States of America, United States Treasury Department Ownership Certificate Form No. 1001 (green) duly filled in and signed by such owner, or, in the case of a national of the United States of America resident of a country other than the United States of America, United States Treasury Department Ownership Certificate Form No. 1000 (White) duly filled in and signed by such owner.

As I pointed out in my letter to you of January 11, 1934, we wish to have it clearly understood that Bethlehem intends fully to perform its obligations with respect to all of [fol. 44] its bonds. So long, however, as Joint Resolution No. 10 of the 73rd Congress, approved June 5, 1933, shall continue in effect, we shall deem it our duty to decline to make payment in foreign countries, in gold or in any foreign currency of coupons from the above-mentioned bonds which were owned by residents of the United States on the date of the approval of such Joint Resolution, unless and until it shall have been finally determined that we are justified in making such payment.

Wm. J. Brown, Treasurer.' ''

AFFIDAVIT OF A. SPRECHER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. A. Sprecher, Assistant Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am an Assistant Manager of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and represent the Zurich General Accident and Liability Insurance Company, Ltd. of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is, and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

[fol. 45] My Company, as aforesaid, prior to September, 1, 1934, purchased for value $283,000 coupon bonds of Lackawanna Steel Company, each of said bonds being known as First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, due March 1, 1950, which bonds are numbered respectively as follows:

111, 173, 185, 251, 258, 277, 322, 393, 452, 535, 546, 565, 604, 633, 677, 684, 692, 822, 834, 863/64, 905, 964, 1007, 1091, 1123, 1258, 1278, 1309, 1355, 1401, 1488/89, 1508, 1560, 1707, 1709, 1783, 1863, 1909, 1951, 1980/81, 2019, 2105, 2107, 2124, 2170, 2180, 2188, 2293, 2344, 2362/63, 2365, 2376, 2406, 2542, 2549, 2572, 2581, 2627. 2654, 2666, 2718, 2795/96, 2839, 2850, 2874, 2879, 3045, 3051, 3094/96, 3123/24, 3135, 3208, 3260, 3272, 3288, 3305/06, 3333, 3356, 3385, 3403, 3469, 3477, 3505, 3557, 3596, 3810, 3834, 3866, 3911/13, 4007, 4024, 4043, 4091/93, 4189/90, 4273, 4289, 4291/92, 4296/97, 4347, 4364/68, 4447, 4456, 4461, 4471, 4476, 4534, 4536, 4553, 4641, 4734, 4753, 4837, 4872, 4894/95, 4936, 5218/20, 5245, 5268, 5371, 5374, 5471, 5483, 5494, 5505, 5543, 5556, 5573, 5648, 5653, 5700, 5755, 5774/75, 5936, 5951, 6024, 6038, 6055, 6142, 6236, 6275, 6293, 6297, 6314, 6368, 6528, 6541, 6590, 6625/26, 6703. 6718. 6732/36, 6804/05, 6834, 6843, 6908, 6929, 6937, 7151, 7157, 7193, 7228/29, 7277, 7400, 7454, 7494, 7506, 7522, 7550/51, 7566, 7576, 7643, 7650, 7727/30, 7788, 7799, 7805, 7807, 7818, 7846, 7879, 8020/22, 8082/84, 8094, 8169, 8174, 8199/8200, 8266, 8270, 8308. 8314, 8317, 8413, 8477, 8482, 8501, 8505, 8511/12, 8542, 8568, 8596, 8621, 8670, 8715, 8851, [fol. 46] 8853, 8860, 8873, 8886, 8905/06, 8917, 9028/29, 9077, 9096, 9113, 9118, 9123, 9171, 9212, 9231, 9233, 9261, 9293, 9304, 9332, 9391, 9422/23, 9429, 9478, 9491, 9671, 9694/95, 9730/31, 9886, 9907, 9914/15, 9966.

At the time said bonds were purchased by my Company, there were appurtenant thereto all interest coupons maturing on and after September 1, 1934, and all said coupons were therefore purchased by my Company for value prior to their respective maturity dates.

I am informed and verily believe that on or about October 10, 1922, Bethlehem Iron and Steel Corporation, a corporation duly organized and existing under the laws of the State of New York, United States of America, the name of which corporation was at that time Bethlehem Steel Company of New York, Inc., acquired by purchase the property of said Lackawanna Steel Company as an entirety and that said

Bethlehem Iron and Steel Corporation for valuable consideration and as part of the purchase price of the said property of Lackawanna Steel Company as an entirety, by an Indenture dated October 10, 1922, between it and Central Union Trust Company of New York as Trustee, for the benefit of said Trustee and for the benefit of affiant as the owner and holder of the bonds and coupons above referred to, assumed the due and punctual payment of the principal and interest of said bonds at the dates and the places and in the manner mentioned in such bonds and in the coupons appurtenant thereto.

Since the purchase of the aforesaid bonds and appurte- [fol. 47] nant coupons, the following coupons have become due and payable: Coupons numbered 49, which matured September 1, 1934, coupons numbered 50, which matured March 1, 1935, coupons numbered 51, which matured September 1, 1935 and coupons numbered 52, which matured March 1, 1936.

My Company, as aforesaid, is now, and ever since the purchase thereof has been, the lawful holder and legal owner of the 283 coupons numbered 49, the 283 coupons numbered 50, the 283 coupons numbered 51 and the 283 coupons numbered 52, which were attached and appurtenant to the aforementioned bonds.

Each of the said coupons is in the following form with the appropriate date of maturity and serial number inserted therein, to wit:

"On the — day of — 193-, unless the bond hereinafter mentioned shall have been duly called for previous redemption, Lackawanna Steel Company will pay to the Bearer at its Office or Agency in the City of New York, U. S. A., Twenty-Five Dollars United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M., Germany, M.105, or in Amsterdam, Holland, Gl.62, or if paid in France, Belgium or Switzerland Fcs. 129.50, being six months' interest then due on its First Consolidated Mortgage Gold Bond Series "A".

$25.—U. S. Gold
£5.2.10½ Stg.
Marks 105.—
Guilders 62.—
Francs 129.50.

No. —." J. P. Higginson, Treasurer.

[fol. 48] The paying agents of Bethlehem Iron and Steel Corporation at Zurich, Switzerland, for the payment of the bonds and coupons above mentioned were and are the Schweizerische Kreditanstalt, said firm having been designated as said paying agents by Lackawanna Steel Company and by Bethlehem Iron and Steel Corporation.

On the 15th day of July, 1936, my Company caused each of said 283 coupons numbered 49 and each of said 283 coupons numbered 50 and each of said 283 coupons numbered 51 and each of said 283 coupons numbered 52 to be presented for payment to the Schweizerische Kreditanstalt at Zurich, Switzerland, by Mr. Paul Fischer, Notary Public of the City of Zurich, who thereupon demanded payment against surrender of the said coupons of 146,594.00 Swiss Francs, or 129.50 Swiss Francs for each coupon. Said payment was thereupon refused and upon such coupons being so dishonored, they were protested for non-payment by Paul Fischer, said Notary Public, a photostatic copy of whose certificate of protest, together with a true English translation thereof being attached hereto as Exhibit A and made a part hereof.

My Company has not received payment of the number of Swiss Francs called for in the above described coupons or any of them nor any part thereof and Bethlehem Iron and Steel Corporation still refuses to pay the number of Swiss Francs provided for in said coupons.

To the best of my knowledge and belief, none of the bonds referred to herein has been called for redemption.

The original coupons above described will be produced in court at the appropriate time.

[fol. 49] This affidavit is made in contemplation of and for use in suitable legal proceedings to be instituted for the collection of the damages sustained by affiant by reason of Bethlehem Iron and Steel Corporation's failure to pay said coupons.

(Sworn to by A. Sprecher before the American Vice Consul at Zurich, Switzerland, on July 29, 1936.)

EXHIBIT "A", ANNEXED TO FOREGOING AFFIDAVIT OF A. SPRECHER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This exhibit, which is in the German language, together with an English translation, is a copy of an exemplified

certificate of protest for non-payment of coupons presented on behalf of plaintiff. So much of the exhibit as is in the German language is omitted in printing by stipulation printed herein on page 63.

Attestation by Notary Public

I, Paul Fischer, the undersigned Notary Public of the City of Zurich (Altstadt) hereby certify that to-day I presented on behalf and upon request of the "Zürich" Allgemeine Unfallund Haftpflicht-Versicherungs-Aktiengesellschaft (Zurich General Accident and Liability Insurance Company, Limited) of Zurich, the following coupons, each payable with Gold-dollars 25.—, or Swiss Frs. 129.50, each coupons to a bond of the Lackawanna Steel Company in New York, which bonds are respectively numbered:

[fol. 50] 111, 173, 185, 251, 258, 277, 322, 393, 452, 535, 546, 565, 604, 633, 677, 684, 692, 822, 834, 905, 964, 863, 864, 1007, 1091, 1123, 1258, 1278, 1309, 1355, 1401, 1488, 1489, 1508, 1560, 1707, 1709, 1783, 1863, 1909, 1951, 1980, 1981, 2019, 2105, 2107, 2124, 2170, 2180, 2188, 2293, 2344, 2362, 2363, 2365, 2376, 2406, 2542, 2549, 2572, 2581, 2627, 2654, 2666, 2718, 2795, 2796, 2839, 2850, 2879, 3045, 3051, 3094, 2874, 3095, 3096, 3123, 3124, 3135, 3208, 3260, 3272, 3288, 3305, 3306, 3333, 3356, 3385, 3403, 3469, 3477, 3505, 3557, 3596, 3810, 3834, 3866, 3911/13, 4007, 4024, 4043, 4091/93, 4189, 4190, 4273, 4289, 4291/92, 4296, 4297, 4347, 4364/68, 4447, 4456, 4461, 4471, 4476, 4534, 4536, 4553, 4641, 4734, 4753, 4837, 4872, 4894/95, 4936, 5218/20, 5245, 5268, 5371, 5374, 5471, 5483, 5494, 5505, 5543, 5556, 5573, 5648, 5653, 5700, 5755, 5774, 5775, 5936, 5951, 6024, 6038, 6055, 6142, 6236, 6275, 6293, 6297, 6314, 6368, 6528, 6541, 6590, 6625, 6626, 6703, 6718, 6732/36, 6804/5, 6834, 6843, 6906, 6929, 6937, 7151, 7157, 7193, 7228, 7229, 7277, 7400, 7454, 7494, 7506, 7522, 7550/51, 7566, 7576, 7643, 7650, 7727/30, 7788, 7799, 7805, 7807, 7818, 7846, 7879, 8020/22, 8082/84, 8094, 8169, 8174, 8199, 8200, 8266, 8270, 8308, 8314, 8317, 8413, 8477, 8482, 8501, 8505, 8511, 8512, 8542, 8568, 8596, 8621, 8670, 8715, 8851, 8853, 8860, 8873, 8886, 8905, 8906, 8917, 9028, 9029, 9077, 9096, 9113, 9118, 9123, 9171, 9212, 9231, 9233, 9261, 9293, 9304, 9332, 9391, 9422, 9423, 9429, 9478, 9491, 9671, 9694, 9695, 9731, 9730, 9886, 9907, 9914, 9915, 9966, in all

283 coupons which were due on September 1, 1934,
[fol. 51] 283 coupons which were due on March 1, 1935,
283 coupons which were due on September 1, 1935,
283 coupons which were due on March 1, 1936.

to the Schweizerische Kreditanstalt (Crédit Suisse), domiciled in Zurich, presenting at the same time four Ownership Certificates No. 1001 for the respective bonds, and demanded payment of the amount stated on the Coupons, viz. Swiss Frs. 129.50 for each Coupon.

That thereupon Messrs. Beutl and Gläss, both of them being duly authorized agents of said Bank, empowered to sign jointly, or each of them jointly with another duly authorized officer of said Bank, declared that the Schweizerische Kreditanstalt would redeem the Coupons presented to them on the following conditions:

a. That the coupons presented for payment be accompanied by the Ownership Certificate No. 1001 in case the holder is not a citizen of the United States of America and is domiciled outside of the territory of the United States;

b. That the coupons presented for payment be accompanied by the Ownership Certificate No. 1000 in case the holder is a citizen of the United States of America but is domiciled outside of the Territory of the United States.

and that moreover the coupons presented for payment be accompanied by an affidavit attested to by a duly authorized [fol. 52] officer of the Bank or by a Notary Public, such affidavit being worded as follows:

Affidavit

5% First Consolidated Mortgage Gold Bonds

Series A

Lackawanna Steel Company

The undersigned —— —— (Name) in —— (Address) owner of the bonds from which the following coupons were detached, viz. (Please indicate maturity date of Coupons and number of bonds) — declares that he is and has been continuously for a period of six months prior to this day, a bona fide resident of a country or countries other than the United States of America, and that the bonds from which

such coupons were detached have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933.

Dated ——— —, ——.

(Signature:) ——— ———.

Subscribed, sworn to and acknowledged before me, this — day of ——, ——. ——— ———.

P. S.—The affidavit must be signed on a date not more than twenty days prior to the date on which such coupons shall be surrendered.

[fol. 53] For want of the above described affidavit, the Schweizerische Kreditanstalt, by its above named authorized agents, denied the payment of the interest coupons presented as stated above.

Whereupon I have drawn up this Protest, under reservation of all lawful rights and actions.

Zurich, July 15th, 1936.

Notariat Zürich (Altstadt), Paul Fischer, Notary.
(Seal.)

Frs. 50.— fee,
" 1.— stamp, duty and postage,

Frs. 51 — in all.

AFFIDAVIT, SWORN TO SEPTEMBER 9, 1937, OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. J. Hunsperger, Sub-Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am a Sub-Manager of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and [fol. 54] represent the Zurich General Accident and Liability Insurance Company, Ltd. of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is, and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

My Company, as aforesaid, prior to September 1, 1934, purchased for value $323,000.—coupon bonds of Lackawanna Steel Company, each of said Bonds being known as First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, due March 1, 1950, which bonds are numbered, respectively, as follows:

63, 111, 173, 185, 251, 258, 277, 311, 322, 393, 452, 535, 546, 565, 604, 625, 633, 677, 684, 692, 713, 822, 834, 863/64, 905, 964, 1007, 1018, 1091, 1123, 1198, 1221, 1239, 1257/58, 1278, 1309, 1338/40, 1355, 1401, 1488/89, 1508, 1560, 1575, 1707, 1709, 1783, 1863, 1909, 1951, 1980/81, 2019, 2105, 2107, 2117, 2124, 2170, 2180, 2188, 2293, 2344, 2360, 2362/63, 2365, 2376, 2406, 2542, 2549, 2572, 2581, 2627, 2654, 2657, 2666, 2718, 2795/96, 2839, 2850, 2874, 2879, 3045, 3051, 3084, 3094/96, 3123/24, 3135, 3208, 3226, 3260, 3272, 3288, 3293, 3305/6, 3333, 3356, 3385, 3403, 3469, 3477, 3498, 3505, 3532, 3557, 3596, 3692, 3729/30, 3810, 3834, 3866, 3911/13, 4007, 4024, 4043, 4088/93, 4189/90, 4273, 4289, 4291/92, 4296/97, 4347, 4364/68, 4447, 4456, 4461, 4471, 4476, 4534, 4536, 4553, 4573, 4592/93, 4641, 4734, 4753, 4837, 4872, 4894/95, 4936, 5218/20, [fol. 55] 5245, 5252, 5268, 5276, 5371, 5374, 5471, 5483, 5494, 5505, 5543, 5556, 5573, 5648, 5653, 5700, 5755, 5774/75, 5936, 5951, 6024, 6038, 6055, 6142, 6147, 6236, 6275, 6293, 6297, 6314, 6349/50, 6368, 6528, 6541, 6590, 6597, 6625/26, 6703, 6705/8, 6718, 6732/36, 6804/5, 6834, 6843, 6908, 6929, 6937, 7151, 7157, 7193, 7228/29, 7277, 7400, 7454, 7494, 7506, 7522, 7550/51, 7566, 7576, 7643, 7650, 7727/30, 7788, 7799, 7805, 7807, 7810, 7846, 7879, 8020/22, 8082/84, 8094, 8169, 8174, 8199/200, 8266, 8270, 8308, 8314, 8317, 8413, 8477, 8482, 8501, 8505, 8511/12, 8542, 8568, 8596, 8621, 8670, 8715, 8851, 8853, 8860, 8873, 8886, 8905/6, 8917, 9028/29, 9077, 9096, 9113, 9118, 9123, 9171, 9212, 9231, 9233, 9261, 9293, 9304, 9332, 9391, 9422/23, 9429, 9478, 9491, 9671, 9694/95, 9730/31, 9886, 9907, 9914/15, 9966.

At the time said bonds were purchased by my Company there were appurtenant thereto all interest coupons maturing on and after September 1, 1934, and all said coupons

were therefore purchased by my Company for value prior to their respective maturity dates.

I am informed and verily believe that on or about October 10, 1922, Bethlehem Iron and Steel Corporation, a corporation duly organized and existing under the laws of the State of New York, United States of America, the name of which corporation was at that time Bethlehem Steel Company of New York, Inc., acquired by purchase the property of said [fol. 56] Lackawanna Steel Company as an entirety and that said Bethlehem Iron and Steel Corporation for valuable consideration and as part of the purchase price of the said property of Lackawanna Steel Company as an entirety, by an Indenture dated October 10, 1922, between it and Central Union Trust Company of New York, as Trustee, for the benefit of said Trustee and for the benefit of affiant as the owner and holder of the bonds and coupons above referred to, assumed the due and punctual payment of the principal and interest of said bonds at the dates and the places and in the manner mentioned in such bonds and in the coupons appurtenant thereto.

Since the purchase of the aforesaid bonds and appurtenant coupons, the following coupons have become due and payable: Coupons numbered 49, which matured September 1, 1934, coupons numbered 50, which matured March 1, 1935, coupons numbered 51, which matured September 1, 1935, coupons numbered 52, which matured March 1, 1936 and coupons numbered 53, which matured September 1, 1936.

My Company, as aforesaid, is now, and ever since the purchase thereof has been, the lawful holder and legal owner of the 323 coupons numbered 49, the 323 coupons numbered 50, the 323 coupons numbered 51, the 323 coupons numbered 52 and the 323 coupons numbered 53, which were attached and appurtenant to the aforementioned bonds.

Each of the said coupons is in the following form with the appropriate date of maturity and serial number inserted therein, to wit:

[fol. 57] "On the — day of ——, 193-, unless the bond hereinafter mentioned shall have been duly called for previous redemption, Lackawanna Steel Company will pay to the Bearer at its Office or Agency in the City of New York, U. S. A., Twenty-Five Dollars United States Gold, or in London, England, £5.2.10½ Sterling, or in Frankfort o/M., Germany, M. 105, or in Amsterdam, Holland, Gl.62 or if

paid in France, Belgium or Switzerl Frs. 129.50, being six months' interest then due on i irst Consolidated Mortgage Gold Bond Series "A".

$25.—U. S. Gold
£5.2.10½ Stg.
Marks 105.
Guilders 62.
Francs 129.50.

J. P. Higginson, Treasurer.

No. —."

The paying agents of Bethlehem Iron and Steel Corporation at Zurich, Switzerland, for the payment of the bonds and coupons above mentioned were and are the Schweizerische Kreditanstalt, said firm having been designated as said paying agents by Lackawanna Steel Company and by Bethlehem Iron and Steel Corporation.

On the 7th day of September, 1936, my Company caused 323 coupons numbered 53 (the coupons numbered 49 to 52 having been presented for payment before) to be presented for payment to the Schweizerische Kreditanstalt at Zurich, [fol. 58] Switzerland, by Mr. Emil Bühler, Substitute of the Notary Public of the City of Zurich (Altstadt), who thereupon demanded payment against surrender of the said coupons of 41,828.50 Swiss Francs, or 129.50 Swiss Francs for each coupon. Said payment was thereupon refused and upon such coupons being so dishonored, they were protested for non-payment by Emil Bühler, said Substitute of the Notary Public, a copy of whose certificate of protest, together with a true English translation thereof being attached hereto as Exhibit A and made a part hereof.

My Company has not received payment of the number of Swiss Francs called for in the above described coupons or any of them nor any part thereof and Bethlehem Iron and Steel Corporation still refuses to pay the number of Swiss Francs provided for in said coupons.

To the best of my knowledge and belief, none of the bonds referred to herein has been called for redemption.

The original coupons above described will be produced in court at the appropriate time.

This affidavit is made in contemplation of and for use in suitable legal proceedings to be instituted for the collection

of the damages sustained by affiant by reason of Bethlehem Iron and Steel Corporation's failure to pay said coupons.

J. Hunsperger.

(Sworn to by J. Hunsperger before the American Vice-Consul at Zurich, Switzerland, on September 9, 1936.)

[fol. 59] EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This exhibit, which is in the German language, together with an English translation, is a copy of an exemplified certificate of protest for non-payment of coupons presented on behalf of plaintiff. So much of the exhibit as is in the German language is omitted in printing by stipulation printed herein at page 93.

Attestation by Notary Public

I, Emil, Bühler, the undersigned Substitute of the Notary Public of the City of Zurich (Altstadt) hereby certify that to-day I presented on behalf and upon request of the "Zürich" Allgemeine Unfall- und Haftpflicht-Versiche-rungs, Aktiengesellschaft ("Zurich" General Accident and Liability Insurance Company, limited) of Zurich, 323 coupons nr. 53, each payable with Gold-dollars 25.-, or Swiss Frs. 129.50, due 1st September 1936 each coupons to a bond of the Lackawanna Steel Company in New York, which bonds are respectively numbered:

63 111 173 185 251 258 277 311 322 393 452 535 546 565 604 625 633 677 684 692 713 822 834 863/64 905 964 1007 1018 1091 1123 1198 1221 1239 1257/58 1278 1309 1338/40 1355 1401 1488/89 1508 1560 1575 1707 1709 1783 1863 1909 1951 1980/81 2019 2105 2107 2117 2124 2170 2180 2188 2293 2344 2360 2362/63 2365 2376 2406 2542 2549 2572 2581 2627 2654 2657 2666 2718 2795/96 2839 2850 2874 2879 3045 3051 3084 3094/96 3123/24 3135 3208 3226 3260 3272 3288 3293 3305/06 3333 3356 3385 3403 3469 [fol. 60] 3477 3498 3505 3532 3557 3596 3692 3729/30 3810 3834 3866 3911/13 4007 4024 4043 4088/93 4189/90 4273 4289 4291/92 4296/97 4347 4364/68 4447 4456 4461 4471 4476 4534 4536 4553 4573 4592/93 4641 4734 4753 4837 4872 4894/95 4936 5218/20 5245 5252 5268 5276 5371 5374 5471 5483 5494 5505 5543 5556 5573 5648 5653 5700 5755 5774/75

5936 5951 6024 6038 6055 6142 6147 6236 6275 6293 6297 6314 6349/50 6368 6528 6541 6590 6597 6625/26 6703 6705/08 6718 6732/36 6804/05 6834 6843 6908 6929 6937 7151 7157 7193 7228/29 7277 7400 7454 7494 7506 7522 7550/51 7566 7576 7643 7650 7727/30 7788 7799 7805 7807 7818 7846 7879 8020/22 8082/84 8094 8169 8174 8199/200 8266 8270 8308 8314 8317 8413 8477 8482 8501 8505 8511/12 8542 8568 8596 8621 8670 8715 8851 8853 8860 8873 8886 8905/06 8917 9028/29 9077 9096 9113 9118 9123 9171 9212 9231 9233 9261 9293 9304 9332 9391 9422/23 9429 9478 9491 9671 9694/95 9730/31 9886 9907 9914/15 9966

to the Schweizerische Kreditanstalt (Crédit Suisse), domiciled in Zurich, presenting at the same time Ownership Certificate Nr. 1001 for the respective bonds, and demanded payment of the amount stated on the Coupons, viz. Swiss Frs. 129.50 for each Coupon.

That thereupon Messrs. Beutl and Gläss, both of them being duly authorized agents of said Bank, empowered to sign jointly, or each of them jointly with another duly authorized officer of said Bank, declared that the Schwei- [fol. 61] zerische Kreditanstalt would redeem the coupons presented to them on the following conditions:

a. That the coupons presented for payment be accompanied by the Ownership Certificate Nr. 1001 in case the holder is not a citizen of the United States of America and is domiciled outside of the territory of the United States;

b. That the coupons presented for payment be accompanied by the Ownership Certificate Nr. 1000 in case the holder is a citizen of the United States of America but is domiciled outside of the Territory of the United States.

and that moreover the coupons presented for payment be accompanied by an affidavit attested to by a duly authorized officer of the Bank or by a Notary Public, such affidavit being worded as follows:

Affidavit

5% First Consolidated Mortgage Gold Bonds

Series A

Lackawanna Steel Company

The undersigned —— —— (Name) in —— (Address) owner of the bonds from which the following coupons were

detached, viz. (Please indicate maturity date of Coupons and numbers of bonds) declares that he is and has been continuously for a period of six months prior to this day, a bona fide resident of a country or countries other than the United States of America, and that the bonds from [fol. 62] which such coupons were detached have been owned by a bona fide resident or bona fide residents of a country or countries other than the United States of America continuously since June 5, 1933.

Dated —— —, ——.

(Signature) —— ——.

Subscribed, sworn to and acknowledged before me, this — day of ——. ——.

P. S.—The affidavit must be signed on a date not more than twenty days prior to the date on which such coupons shall be surrendered.

For want of the above described affidavit, the Schweizerische Kreditanstalt, by its above named authorized agents, denied the payment of the interest coupons presented as stated above.

Whereupon I have drawn up this Protest, under reservation of all lawful rights and actions.

Zurich, September 7th, 1936.

Notariat Zürich (Altstadt), E. Bühler, Notary Public of ——. (Seal.)

Frs. 50.—fee,
" 1.—stamp, duty and postage,

Frs. 51.—in all.

[fol. 63] AFFIDAVIT, SWORN TO APRIL 26, 1937, OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. J. Hunsperger, Sub-Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am a Sub-Manager, of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and represent the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

My Company, as aforesaid, prior to September 1, 1934, purchased for value $323,000 coupon bonds of Lackawanna Steel Company, each of said bonds being known as First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company, due March 1st, 1950, each bond certificate bearing a statement to the effect that its face value is $1,000 U. S. Gold, or £205.15.2 Stg., or M. 4,200 D.R.W., or Guilders 2,480, or Francs 5,180.

My Company, as aforesaid, acquired the said bonds as hereafter stated:

Bought from Mackay & Co., Brokers in New York City, Otherwise the Former Owner Not Being Known

[fol. 64]

$100,000.—twelve different purchases made between November 9th, 1933 and December 13th, 1933; from Mackay & Co., Brokers in New York City, otherwise the former owner not being known,

$198,000.—fifty-one different purchases made between January 11th, 1934, and August 22nd, 1934; from American Express Company in Zurich, Switzerland otherwise the former owner not being known.

$ 25,000.—purchased August 9th, 1934.

$323,000.—in all.

This affidavit is made for use in a pending legal proceeding instituted for the collection of the damages sustained by the affiant by reason of Bethlehem Iron and Steel Corporation's—as Successors of Lackawanna Steel Company—

failure to pay the coupons on above bonds in Swiss Francs or in Dutch Guilders.

J. Hunsperger, Sub-Manager.

(Sworn to by J. Hunsperger before American Vice Consul at Zurich, Switzerland, on April 26, 1937.)

[fol. 65] AFFIDAVIT, SWORN TO JULY 15, 1937, OF J. HUNSPERGER, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CONFEDERATION OF SWITZERLAND,
Canton and City of Zurich, ss:

Mr. J. Hunsperger, Sub-Manager, Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, being duly sworn, deposes and says:

I am a Sub-Manager of the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, and in such capacity am empowered to act for, and represent the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland.

My Company, the Zurich General Accident and Liability Insurance Company, Limited, of Zurich, Switzerland, is and at all times hereinafter mentioned has been, a corporation organized under the laws of the Republic of Switzerland and having its principal seat of business in Switzerland.

On January 11th, 1934, the Bethlehem Steel Corporation of New York Incorporated in a letter addressed to the Committee of the New York Stock Exchange declared it to be their intention fully to perform its obligations with respect to all its bonds of the following issues:

Bethlehem Steel Company 5% 1942
Lackawanna Steel Company 5% 1950

and stated that provisions have been or will be made to the effect that holders residing outside of the United States of America will be enabled to receive the value of their coupons in the respective foreign exchanges.

[fol. 66] In a letter dated August 7th, 1934, to the Committee of the New York Stock Exchange, the Company revised this standpoint or rather assured that its letter of January 11th, 1934, had been misinterpreted and that it

had been their intention that exclusively foreign holders who had obtained their bonds prior to June 5th, 1933, were entitled to exercise the option of payment in Dollars or Guilders.

As stated in my affidavit of April 20th, 1937, my Company acquired in the time between January 11th, 1934 (date of the first letter of Bethlehem Steel Company to the New York Stock Exchange), and August 22nd, 1934 (date at which the second letter of the Bethlehem Steel Company to the New York Stock Exchange became known in Europe), an amount of $223,000.—Lackawanna Steel Company 5% 1950 in 52 different purchases, the first purchase having been effected on April 25th, 1934, the last one on August 9th, 1934.

At the time when these bonds were purchased, my Company was aware of the policy and practice of Bethlehem Steel Company in making payments to foreign holders of coupons in the foreign currencies specified without regard to the time of acquisition of the bonds and that the coupons of Lackawanna bonds which matured as late as March 1st, 1934, were so paid. Furthermore, my Company was aware of and relied upon a letter of Bethlehem Steel Company to the New York Stock Exchange dated January 11th, 1934, in which it was stated that Bethlehem Steel Company had made or would make provisions whereby owners of Lackawanna and Bethlehem bonds residing in foreign countries [fol. 67] would receive payment in such countries and in the currencies specified in the coupons. On the other hand, the letter of August 7th, 1934, in which the Bethlehem Steel Company declared that it would pay only on the conditions therein stated, was not known to my Company when the above stated purchases were effected.

This affidavit is made for use in a pending legal proceeding instituted for the collection of the damages sustained by the affiant by reason of Bethlehem Iron and Steel Corporation's—as Successors of Lackawanna Steel Company—failure to pay the coupons on the above bonds in Swiss Francs or in Dutch Guilders.

(Sworn to by J. Hunsperger before American Vice Consul at Zurich, Switzerland, on July 15, 1937.)

AFFIDAVIT OF GEORGE L. LEBLANC, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

George L. LeBlanc, being duly sworn, deposes and says:

I am an advisor in currency matters, including foreign exchange, with offices at 44 Wall Street, in the City of New York.

From 1912 to 1914 I was Manager of the Foreign Department of the American Express Company in New York. [fol. 68] From 1914 to 1929 I was Manager and from 1916 to 1929 I was Vice-President of the Foreign Department of the Equitable Trust Company of New York, which conducted one of the largest businesses in foreign exchange in the world. From 1920 to 1929 I was President of the Equitable Eastern Banking Corporation of New York. From 1929 to 1930 I was President of the Interstate Trust Company of New York. From 1930 to the present as an advisor in matters of currency and foreign exchange, I have at all times been interested in and concerned with the money markets of the world and various currency fluctuations in them.

I have had wide experience trading in foreign exchange, and have bought and sold foreign currencies. During my entire connection with the business of foreign exchange I have been and am familiar with the prices generally at which Swiss francs have sold in New York. As part of my work, I have been and am familiar with dollar prices generally in world markets and I have been and am familiar with the prices at which the dollar has sold in Zurich, Switzerland.

The Bank and Quotation Record, a monthly publication published by William B. Dana Company, 25 Spruce Street, New York, N. Y., which firm also publishes the Commercial and Financial Chronicle, a weekly publication, is relied upon in the trade by dealers in foreign exchanges generally as accurate in its quotations of the market values of foreign exchange and said quotations are accepted by such dealers as authentic. These quotations are compiled by William B. Dana Company from records of actual trans- [fol. 69] actions by various dealers in foreign exchange on the days for which the quotations are given. The values given in United States currency for cable rates for Swiss

francs in New York are generally equivalent to the value of the dollar in Zurich, Switzerland on the corresponding day. Any slight differences between the value of the Swiss franc in New York and the value of the dollar in Zurich Switzerland, are quickly adjusted during the day.

During the period from March 1, 1934 through September 8, 1936, the rates of exchange between the dollar and the Swiss franc were so stable that any difference between the value of the Swiss franc in New York and the value of the dollar in Zurich, Switzerland at any particular time was practically negligible.

On the basis of the above facts, as stated in this affidavit, and on the basis of my past experience trading in foreign exchange as well as my experience as an advisor in currency matters, and in the light of my knowledge of the value of the dollar in Zurich, Switzerland, I conclude and it is my opinion that the quotation of the lowest values of the Swiss franc in New York, either check or cable rates, on any particular day during the above period, as indicated in the Bank and Quotation Record, corresponded with and were equivalent to the lowest value of the Swiss franc in terms of the dollar in Zurich, Switzerland on the date of said quotation.

[Sworn to by George L. LeBlanc on September 14, 1937.]

[fol. 70] AFFIDAVIT, SWORN TO SEPTEMBER 14, 1937, OF REDMOND F. KERNAN, JR., READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Redmond F. Kernan, Jr., being duly sworn, deposes and says: I am an attorney at law admitted to practice in the Supreme Court of the State of New York and am associated with Miller, Owen, Otis & Bailly, No. 15 Broad Street, New York, N. Y., attorneys for the plaintiff in the above entitled action.

This action is for damages for breach of contract to pay to the plaintiff 129.50 Swiss francs per coupon in respect of coupons of Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, Series A, due March 1, 1950,

which plaintiff caused to be presented for payment at the agency of the defendant Schweizerische Kreditanstalt at Zurich, Switzerland, and which defendant, through its said paying agency, refused to pay.

In order to determine the market value in lawful money of the United States of the number of Swiss francs which the plaintiff was entitled to receive in respect of the aforesaid coupons, I have examined various issues of the Bank and Quotation Record, financial publication published by William B. Dana Company, 25 Spruce Street, New York, N. Y., and found in said publication the quotations listed below to be the lowest for either check or cable rates on the dates of maturity and dates of presentation of the coupons or on the first business day subsequent to such dates. [fol. 71] The following are the lowest values in United States currency of the Swiss franc on the dates of maturity and the dates of presentation of the coupons which are the subject of the first cause of action:

Date of Maturity	Lowest value in cents of Swiss Franc
September 1, 1934	33.13
March 1, 1935	32.60
September 3, 1935 (September 1, 1935 being Sunday and September 2, 1935 being Labor Day)	32.55
March 2, 1936 (March 1, 1936 being Sunday)	33.06
Date of Presentation	
July 15, 1936	32.75

The following are the lowest values in United States currency of the Swiss franc on the dates of maturity and dates of presentation of the coupons which are the subject of the second cause of action:

Date of Maturity	Lowest value in cents of Swiss Franc
September 1, 1936	32.59
Date of Presentation	
September 8, 1936 (September 7, 1936 being Labor Day)	32.55

The amount of damages claimed in both the first and second causes of action are based upon the lowest value of the Swiss franc on the dates of maturity, which dates have heretofore been adopted by this Court as the proper dates for calculating said damages. The lowest values on the dates [fol. 72] of presentation are also inserted herein to indicate the slight variation in such rates between the dates of maturity and the dates of presentation and in the event that the Court should deem it proper to assess damages as of the dates of presentation.

(Sworn to by Redmond F. Kernan, Jr., on September 14, 1937.)

AFFIDAVIT, SWORN TO SEPTEMBER 23, 1937, OF REDMOND F. KERNAN, JR., READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Redmond F. Kernan, Jr., being duly sworn deposes and says: I am an attorney at law and admitted to practice in the Courts of the State of New York and am associated with Miller, Otis & Bailly, attorneys for the plaintiff in the above entitled action.

This action is brought for the recovery of damages for defendants' failure to pay to the plaintiff 129.50 Swiss francs in respect to each of 1455 coupons detached from Lackawanna Steel Company First Consolidated Mortgage Gold Bonds Series A, due March 1, 1950 in the principal amount of $1000 each.

The first cause of action is on 1132 coupons detached from 283 of said Lackawanna Steel Company Bonds, said coupons [fol. 73] constituting for maturities September 1, 1934, March 1, 1935, September 1, 1935 and March 1, 1936, the coupons being numbered respectively, 49, 50, 51 and 52.

The second cause of action is on 323 coupons detached from 323 Lackawanna Steel Company Bonds which coupons mature September 1, 1936 and which are No. 53. The serial numbers of the 283 Bonds, the coupons of which are the subject of the first cause of action, are contained in the affidavit of A. Sprecher, dated July 29, 1936, in support of the motion for summary judgment herein and the serial numbers

of the 323 bonds, the coupons of which are the subject of the second cause of action, are stated in the affidavit of J. Hunsperger, dated September 9, 1936, in support of the motion for summary judgment. The coupons numbered 49, 50, and 51 detached from the forty (40) bonds involved in the second cause of action but not in the first cause of action, have been paid by the defendant, Bethlehem Iron Mines Company (formerly Bethelehem Iron and Steel Corporation), pursuant to a judgment of this Court entered June 29, 1936 on an order of Mr. Justice Hofstadter granting summary judgment to the plaintiff for damages for the defendants' failure to pay to the plaintiff 129.50 Swiss francs in respect to each of said coupons. The amount of damages have been calculated in United States currency on the basis of the value of the Swiss franc in dollars on the dates of maturity of the coupons. The case in which said summary judgment was granted is Zurich General Accident & Liability Insurance Company, Ltd., plaintiff, vs. Bethlehem [fol. 74] Iron and Steel Corporation, defendant, Index No. 12479-1936. The serial numbers of the forty (40) bonds from which the coupons, the subject of said action, were detached are as follows:

63, 1018, 1198, 1338/40, 2117, 4573, 4592, 4593, 5252, 5276, 6147, 6349, 6350, 6597, 6705/08, 311, 625, 713, 1221, 1239, 1257, 1557, 2360, 2657, 3084, 3226, 3293, 3498, 3532, 3692, 3729, 3730, 4088/90.

See affidavit of A. Sprecher, sworn to November 26, 1935, at pages 45 to 49 of the printed papers on appeal from order and judgment in said action. The amount of the judgment entered against the defendant in said action was $5300.97, consisting of the value of the 129.50 Swiss francs, payable in respect to each of the 120 coupons, based on the rate of exchange between the Swiss franc and the dollar on the dates of maturity of the coupons, or $5082.72, plus interest thereon in the sum of $190, together with costs in the sum of $28.25.

The defendant took an appeal from said judgment of this Court and served printed copies of papers on appeal but abandoned the appeal before argument and paid the full amount of the judgment.

A copy of the papers on appeal from the order and judgment in the above referred to action will be handed to the

Court on the argument of the motion for summary judgment of this action.

Redmond F. Kernan, Jr.

(Sworn to by Redmond F. Kernan, Jr., on September 23, 1937.)

[fol. 75] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF WILLIAM J. BROWN, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

William J. Brown, being duly sworn, deposes and says:

I am an Assistant Treasurer of the defendant Bethlehem Steel Company and am familiar with the financial affairs and records of the defendant.

The coupons upon which this suit has been instituted are coupons detached respectively from $1,000 coupon bonds known as Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, Series A, dated March 1, 1910 and due March 1, 1950 (which are hereinafter referred to as Gold Bonds, Series A) of the face amount of $10,000,000, that were issued in 1910, the proceeds of the sale thereof together with the proceeds of the sale of certain Five Year Five Per Cent. Convertible Gold Bonds of said Company issued simultaneously with said Gold Bonds, Series A, to be first applied to the payment of $10,000,000 face amount, of Gold Notes of said Company which matured March 1, 1910, and $5,000,000, face amount, of Secured Gold Notes of said Company, which also matured on March 1, 1910. A photostatic copy of the form of said Gold Bonds, Series A (showing the face and reverse sides of said form), is annexed hereto as Exhibit A and made a part hereof. A photostatic copy of the form of coupons appurtenant to said Bonds, which shows the face and reverse sides of the form [fol. 76] of the second page of said coupons, is annexed hereto as Exhibit B and made a part hereof.

Said $10,000,000, face amount, of Gold Bonds, Series A, were a part of an authorized issue of $35,000,000, face amount, of Consolidated Mortgage Gold Bonds, and were sold on or about March 1, 1910, partly to stockholders of

said Lackawanna Steel Company and partly to a group of bankers represented by Speyer & Co. of the City of New York.

I am informed and believe that the property and business of said Lackawanna Steel Company at time of the issue of Gold Bonds, Series A, was almost entirely, if not altogether, located and conducted in the United States, and that the $10,000,000, face amount, of said Bonds were issued and sold by said Lackawanna Steel Company in pursuance of a comprehensive plan which provided for the payment of the $15,000,000 Gold Notes maturing on March 1, 1910, and for future financial requirements of said Lackawanna Steel Company in respect of additions and improvements to its property. I am further informed and believe that the facts stated in this paragraph were made known by the President of said Lackawanna Steel Company to said Speyer & Co. on or about March 1, 1910, and were in turn made known by Speyer & Co. and the others composing the group of bankers represented by Speyer & Co. to prospective purchasers of said Gold Bonds, Series A, when they were offered for sale.

On or about October 10, 1922, Bethlehem Iron Mines Company, which is named in the complaint in this action, under its former name of Bethlehem Steel Company of New York, Inc. purchased the properties of said Lackawanna [fol. 77] Steel Company as an entirety and as a part of the purchase price thereof entered into an indenture dated the 10th day of October, 1922, with Central Union Trust Company of New York, which has succeeded by merger to all the rights and powers of Union Trust Company of New York as Trustee under the First Consolidated Mortgage by which the Gold Bonds, Series A, were secured, whereby Bethlehem Iron Mines Company assumed the due and punctual payment of all the Gold Bonds, Series A, issued under said Mortgage, and the performance of all the covenants and conditions of said Mortgage, and charged therewith the property and franchises so taken over by said Bethlehem Iron Mines Company. On or about December 26, 1936, said Bethlehem Iron Mines Company, by Certificate of Merger filed in the office of the Secretary of State of New York, was duly merged with this defendant pursuant to the provisions of Section 85 of the New York Stock Corporation Law, and this defendant assumed all the liabilities and obligations of the merged Bethlehem Iron Mines Company and became

liable therefore in the same manner as if this defendant had itself incurred such liabilities and obligations.

The coupons upon which this suit has been instituted matured, respectively, on September 1, 1934, March 1, 1935, September 1, 1935, March 1, 1936, and September 1, 1936. On each of said coupon maturity dates, there were $6,492,000, face amount, of said Gold Bonds, Series A, outstanding in the hands of the public, with an additional $291,000, face amount, of said Bonds held in the treasury of Bethlehem Iron Mines Company.

[fol. 78] The plants and properties of said Bethlehem Iron Mines Company, with exception of certain Iron ore properties owned by it in Cuba, were, on the respective maturity dates of the coupons involved in this action, located in the United States and if was not, except as to the ownership of said iron ore properties in Cuba, engaged in business outside of the United States and did not in the normal course of business have pounds sterling available in London or Reichsmarks in Frankfort-on-Main, Germany, or guilders in Amsterdam, Holland, or francs in France, Belgium or Switzerland, with which to pay the coupons on said Gold Bonds, Series A. The same facts were and are true as to the defendant Bethlehem Steel Company, at the date of its aforesaid merger with Bethlehem Iron Mines Company and at the present time.

I am informed and believe that all of the Bonds and coupons mentioned in the complaint in this action were, on and after June 5, 1933, owned by persons resident in the United States, and that the interests which the plaintiff alleges that it has in said Bonds and coupons, were acquired by the plaintiff from residents of the United States with full notice and knowledge of Public Resolution No. 10 of the 73rd Congress, entitled "A Joint Resolution to assure uniform value to the coins and currency of the United States" approved June 5, 1933, with intent to evade the application of said Joint Resolution. The source of my information and ground for my belief is the admission made in the plaintiff's motion papers that all of the Bonds and coupons involved in the action were purchased either from New York City brokers or from an American company (affi-[fol. 79] davit of J. Hunsperger, verified April 26, 1937) and the further admission that $223,000, face amount, of said Gold Bonds, Series A, were purchased by the plaintiff

with full knowledge of the contents of a letter written by Bethlehem Steel Corporation to the New York Stock Exchange (a copy of which is annexed to the affidavit of William W. Miller in support of the motion, as Exhibit A) which referred specifically to the Joint Resolution and stated the belief of the said Corporation that said Joint Resolution was applicable to said Bonds and binding upon said Corporation.

With respect to the statements in various affidavits in support of the motion as to the terms of the Consolidated Mortgage Gold Bonds, Series A, and of the coupons appurtenant thereto (Hunsperger affidavit of July 29, 1936, pp. 3-4; Hunsperger affidavit of September 9, 1936, p. 3; Hunsperger affidavit of April 26, 1937, p. 1;), I respectfully refer the Court to Exhibits A and B attached hereto for a true statement of the terms thereof.

Wm. J. Brown.

(Sworn to by William J. Brown on September 17, 1937.)

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT OF WILLIAM J. BROWN, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

This exhibit is a photostatic copy of a specimen form, front and back of a $1,000 Lackawanna Steel Company First Consolidated Mortgage 5% bond, Series A of 1950. The text of the front of this form is printed herein at pages 20 to 23 as Exhibit B to the complaint.

[fol. 80] EXHIBIT B, ANNEXED TO FOREGOING AFFIDAVIT OF WILLIAM J. BROWN, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

This exhibit is a photostatic copy of the form of front and reverse sides of the second page of coupons appurtenant to the form of bond contained in Exhibit A. The text of these forms is printed herein at page 19 as Exhibit A to the complaint.

In Supreme Court of New York

Affidavit of William F. Majory, Read in Opposition to Plaintiff's Motion for Summary Judgment.

State of New York,
County of New York, ss:

William F. Majory, being duly sworn, deposes and says:

I am a clerk in the office of the Assistant Treasurer of the defendant Bethlehem Steel Company. This affidavit is made to supplement the affidavit of William J. Brown verified September 17, 1937, in opposition to the plaintiff's motion for summary judgment. At pages 4 and 5 of Mr. Brown's affidavit, he stated that he was informed and believed that all of the bonds and coupons mentioned in the complaint in this action were, on and after June 5, 1933, owned by persons resident in the United States, and he further stated that his belief was based upon certain admissions made in the affidavits submitted in support of this motion.

[fol. 81] The following facts present further evidence that the 323 bonds and coupons referred to in the complaint were owned by American residents on and after June 5, 1933:

I have examined the records of the defendant Bethlehem Steel Company, including the records formerly of Bethlehem Iron Mines Company, to ascertain whether the coupons from said 323 bonds which matured immediately before and immediately after June 5, 1933 (the date of the Joint Resolution), were paid in New York or abroad. Such records show that all of the coupons maturing March 1, 1933 (the maturity date immediately preceding June 5, 1933), which were appurtenant to said 323 bonds, were paid in New York. They also show that the coupons appurtenant to 319 of said bonds maturing September 1, 1933 (the first maturity date after June 5, 1933) were paid in New York, and that only the remaining 4 coupons appurtenant to bonds involved in this action and maturing on September 1, 1933 were paid abroad. On the next maturity date, March 1, 1934, the plaintiff claims to have already become the owner of 100 of said 323 bonds (affidavit of J. Hunsperger, verified April 26, 1937, p. 1). However, only 96 coupons, of the 323 coupons maturing on that date, were paid abroad. The balance of 227 coupons were paid in New York.

I recognize that the fact that coupons were paid in New York does not necessarily show that the owners of such coupons were American residents at the time of payment, since a foreign resident might have sent his coupons to New York for payment. However, the inference of American owner- [fol. 82] ship of the coupons which is to be drawn from the fact that they were paid in New York becomes very strong when the further fact is considered that foreign owners receiving payment of their coupons in either Swiss francs or guilders would, on each of the three maturity dates, have received more than the $25 payable on said coupons in New York. The values of Swiss francs and guilders on the respective maturity dates are set forth in the affidavit of Robert D. Blasier which is submitted herewith. If those figures are used to compute the value of 129.50 Swiss francs and 62 guilders (these being the amounts of francs and guilders specified in the coupons), the premium in excess of $25 per coupon which a foreigner would secure, if payment were made in such currencies, appears in the following table:

Date of Maturity of Coupon	Dollar Value of 62 Guilders	Dollar Value of 129.50 Swiss Francs
March 1, 1933	$25.07	$25.28
Sept. 1, 1933	35.62	35.75
March 1, 1934	41.60	41.72

Since it would not only have been more convenient but also more profitable for foreign owners to present and receive payment of their coupons maturing on the aforementioned three dates in guilders or Swiss francs, it is very unlikely that any foreign owners sent their coupons to New York for payment. The inference is strong, therefore, that such coupons of the aforementioned maturities as were presented and paid in New York, were owned by American residents and not by foreigners at the time of payment.

William F. Majory.

(Sworn to by William F. Majory on September 22, 1937.)

[fol. 83] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF ROBERT D. BLASIER, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of New York, ss:

Robert D. Blasier, being duly sworn, deposes and says:

I am associated with the firm of Cravath, de Gersdorff, Swaine & Wood, attorneys of record for the defendant, Bethlehem Steel Company.

I have examined various issues of the Bank and Quotation Record, the financial publication referred to in the affidavits of George Le Blanc and Redmond F. Kernan, Jr., which have been submitted in support of plaintiff's motion for summary judgment. My examination of that publication has been made for the purpose of ascertaining the lowest values in United States currency of the Dutch Guilder, and the Swiss Franc on the following maturity dates of coupons appurtenant to Lackawanna Steel Company First Consolidated Mortgage Gold Bonds, Series A: March 1, 1933, September 1, 1933, and March 1, 1934. The March 1, 1933 maturity date was the last maturity date prior to the enactment of the "Joint Resolution to assure uniform value to the coins and currency of the United States" on June 5, 1933, which is referred to in paragraph 10 of the amended answer of Bethelehem Steel Company, and the September 1, 1933 and March 1, 1934 maturity dates were, respectively, the maturity dates next succeeding the enactment of said Joint Resolution.

[fol. 84] The quotations listed below, which are taken from the Bank and Quotation Record, are the lowest values in United States currency of the respective foreign currencies, for either check or cable rates, on the respective maturity dates:

Date of Maturity	Guilders (Amsterdam)	Swiss Francs
Mar. 1, 1933	$.4043	$.19525
Sept. 1, 1933	$.5745	$.2761
Mar. 1, 1934	$.6709	$.3222

Robert D. Blasier.

(Sworn to by Robert D. Blasier on September 22, 1937.)

IN SUPREME COURT OF NEW YORK

OPINION BY MR. JUSTICE ROSENMAN

164 Misc. Rep. 498

By Mr. Justice ROSENMAN:

This is a motion for summary judgment by the holder of a large number of matured coupons appurtenant to bonds issued by the Lackawanna Steel Company, the payment of which has been assumed by the defendant Bethlehem Steel Company. The coupons provide that the obligor "will pay to the bearer at its office or agency in the City of New York, U. S. A., Twenty-five Dollars, United States Gold, or in London, England £5.2.10½ Sterling, or in Frankfort o/M., Germany, M. 105, or in Amsterdam, Holland, Gl.62, or if paid in France, Belgium or Switzerland, Fcs. 129.50, being [fol. 85] six months' interest then due on its First Consolidated Mortgage Gold Bonds Series A."

The plaintiff presented its coupons for payment in Switzerland and demanded payment in Swiss francs. The defendant refused to meet the demand, and the plaintiff has brought this action to recover the dollar value of the Swiss francs which it claims should have been paid when these coupons were presented for payment.

The plaintiff's demand is for a sum substantially in excess of the number of United States dollars called for by the coupons, as a result of the devaluation of the American currency which took place in 1933 and 1934. This premium the defendant has refused to pay. The defendant is willing to pay the twenty-five dollars in present American currency, as called for in the coupons. If the plaintiff prevails, instead of receiving twenty-five dollars for each coupon, it will receive a much greater amount. The defendant's position is that the joint resolution of the Congress, dated June 5, 1933 (Public Resolution No. 10, 73d Congress; 48 U. S. Stat. at Large, 113; U. S. Code, tit. 31, § 463), permits it to discharge its obligation to its bondholders by payment, dollar for dollar, in legal tender. The defendant also resists summary judgment on the further contention that the plaintiff purchased these coupons from American holders after June 5, 1933, for the sole purpose of evading the provisions of the joint resolution, on the theory that, although

American citizens might be bound by the terms of the resolution, foreigners would not be so bound.

The plaintiff's contention is that the joint resolution does not cover these coupons in so far as they are payable in alternative currencies.

An analysis of the joint resolution will disclose that it re-
[fol. 86] lates to two independent subjects, both of which may or may not be included in any one particular instrument.

It relates to every "*obligation*" payable in money of the United States. It relates also to "*provisions*" in any obligation which give the obligee a right to demand payment in gold.

With respect to such "obligations," it provides that they shall be payable, dollar for dollar, in any legal tender. With respect to such "provisions," it provides that every one of them, past, present or future, shall be void as against public policy. And it further provides that every obligation is payable, dollar for dollar, in legal tender even though there be not included in the obligation such a provision to pay in gold.

In each of the coupons involved in this suit there is the "provision" about payment in gold. In each of them there is also an "obligation payable in money of the United States," but there is also contained in them a further provision about payments in alternative currencies. Therefore, both of these main subjects which are treated by the joint resolution are included in the one obligation, i. e., the coupon.

The joint resolution says that the first provision is void as against public policy. The question presented here is whether the provision for payments in alternative currencies may be enforced. It may not be enforced if the joint resolution says it may not, for the joint resolution has been upheld as a valid exercise of the Congressional power to regulate the currency of the United States. (Norman v. Baltimore & O. R. R. Co., 294 U. S. 240.)

The joint resolution by its very terms covers "every obli-
[fol. 87] gation," which is defined as "every obligation payable in money of the United States." This language is broad enough to cover these coupons, even though they are alternatively payable in other currencies. If one alternative method of payment is proscribed by the statute expressly, the entire obligation is covered even though the

other alternative may not itself be specifically banned. This is the rule which has been applied to situations where an agreement is framed in the alternative and one of the alternatives is subject to the Statute of Frauds. The statute is deemed in such cases to include the entire obligation, so that both alternatives contained in the obligation are considered unenforcible. (De Beerski v. Paige, 36 N. Y. 537.) The same principle should be applied to the analogous situation here under consideration.

The joint resolution, not stopping with the phrase which outlaws provisions in obligations calling for payment in gold, proceeds to make payment of legal tender sufficient for all obligations payable in money of the United States, whether they contain such a provision for gold payment or not. This latter provision, applicable to all such obligations, was not necessary if the joint resolution were only intended by the Congress to cover United States coin or currency, since the separate gold clause provision in the resolution took care of the question of United States coin and currency even if gold payments were promised. It must have been intended by the Congress to cover not only situations where gold had been promised, but also all cases where a promise has been made, like the present one, which would have required payment in some other manner than dollar for [fol. 88] dollar on a parity with other obligations. An alternative currency provision is one of the contingencies at which the joint resolution was aimed.

The resolution was adopted by the Congress as one of a series of legislative and executive acts designed to meet the unprecedented economic and monetary crisis which had come upon the Nation. The general policy followed in these enactments was to devalue the dollar for the purposes of protecting the foreign commerce of the United States from other depreciated currencies, of maintaining the parity of currency issues of the United States, and of reducing the unjust burden of debts which, because of fallen prices, required payment in so many more units of commodities in 1933 than when the debts had been created. That was the policy expressed in the preamble of the joint resolution itself; it had been declared in the so-called Thomas amendment to the Agricultural Adjustment Act (48 U. S. Stat. at Large, 51-53, § 43), which gave the President the right to devalue the dollar. The joint resolution had to be enacted to protect this policy, because so many billions of dollars

of obligations issued in normal times were then outstanding which had contractual requirements inconsistent with this policy, such as payment in gold, or payment in currencies of other nations which had not gone off the gold standard. In the emergency it was clearly necessary to invalidate all provisions which were in conflict with this general policy; and that was the intent of the Congress when it acted.

The purpose of the resolution, as judicially stated by our highest court, was "to establish a uniform currency, and parity between kinds of currency, and to make that cur- [fol. 89] rency, dollar for dollar, legal tender for the payment of debts" (Norman v. Baltimore & O. R. R. Co., supra, p. 316). The court there held ineffectual a contractual provision for payment in gold, on the ground that it frustrated this policy of the Congress which was being carried out pursuant to its constitutional "broad and comprehensive national authority over the subjects of revenue, finance and currency" (p. 303). The statement in the opinion pointing out the "dislocation of the domestic economy" which would be caused by "a disparity of conditions" in which debtors on bonds would earn their income in a depreciated currency but would be obliged to disburse their interest payments in a currency of much higher value, is equally applicable to bonds payable in alternative currencies.

From a reading of the resolution in the light of the economic and financial conditions of the time of its adoption and in the light of the avowed policy of the Congress adopted to meet such conditions, I conclude that these coupons are covered by the resolution. That conclusion is in line with established appellate court precedent in this State.

In City Bank Farmers Trust Co. v. Bethlehem Steel Company (244 App. Div. 634) an American owner of bonds similar to those here in suit was denied payment of the undepreciated amount of currency, after presentation of his coupon in Amsterdam for payment in Dutch guilders. It is true that in the opinion of the court in that case significant mention was made of the fact that the plaintiff there was an American citizen, and not a foreigner as in the case now under consideration. The opinion in the Appellate [fol. 90] Division, however, states (at p. 635): "We believe that the points made by the appellant [the obligor of the bond] are sound and that the judgment should be modified." I have examined the brief of the appellant in that case, and no distinction was made therein between American and

foreign holders. The argument was directed principally to the point that "multiple currency" obligations are within the ban of the joint resolution. Although the opinion mentions the fact that the plaintiff was an American corporation, a reading of the entire opinion shows that that was not the basis of the decision. Nor does the joint resolution make any distinction in its terms between different classes either of obligors or obligees—American or foreign.

Even if the conclusions here reached are not correct, that the alternative payments provided for in these coupons are excused by the resolution, the authority of the case of Anglo-Continentale Treuhand, A. G. v. Southern Pacific Co. (N. Y. L. J. Jan. 2, 1937, at p. 9; aff'd without opinion, 251 App. Div., 803) would prevent a summary judgment for any amount in excess of twenty-five dollars for each coupon. For there is still present here, as there was in that case, "the issue of whether the transfer of the coupons to this plaintiff was bona fide or with intent to evade the effects of the joint resolution as interpreted by the Appellate Division," which can be determined only by trial.

It is not necessary to consider what effect, if any, the joint resolution would have if suit were brought in a foreign country. That question would involve the extra-territorial [fol. 91] effect of the resolution on the contractual rights of citizens of another sovereignty. When the suit is brought in our courts, the will of the Congress should be upheld as to all plaintiffs, citizens or foreigners.

The fact that this defendant formerly announced a policy of paying undepreciated currency to bona fide foreign holders of its bonds, who had not purchased their bonds for the purpose of speculating after the devaluation of the American currency, does not prevent it from insisting now upon its legal rights under the joint resolution. Whether its present change of policy has come from a change in business judgment or from a realization of the fact that many American holders of its bonds have been selling their bonds or coupons to foreigners to evade the provisions of the resolution is immaterial.

Two decisions in the federal courts are directly opposed to the result here arrived at: McAdoo v. Southern Pacific Co. (10 F. Supp. 953; revd. on other grounds, 82 F. [2d] 121); Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern R. Co., (81 id. 11; certiorari denied, 298 U. S., 655). Since their decision, however, a contrary ruling

has been made by the Appellate Division in this Department in affirming without opinion the holding in Anglo-Continentale Treuhand A. G. v. Southern Pacific Co. (supra). The authority of our own appellate courts will in such circumstances take precedence, since the denial of certiorari by the highest court does not determine the merits of the appeal.

As to some of the coupons here sued upon, the defense of res adjudicata is raised. This defense is based upon a prior action between these same parties on coupons from [fol. 92] some of these same bonds, in which the plaintiff was awarded summary judgment against the defendant under a judicial construction of the joint resolution different from the one here adopted. The defendant did not appeal from that judgment.

Since the result of this action will not destroy or impair the substance of the rights or interests established in the first action on the other coupons, the defendant may raise new issues even though they could have been interposed and litigated in the prior action (Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N. Y. 304). New defenses are here presented, such as the issue of good faith in the transfer of the coupons. Besides, the sole question on which the prior case was determined was one of law, and not of fact. The rule of stare decisis would accordingly be more appropriate than res adjudicata. However, in view of what I deem to be contrary holdings of the Appellate Division in this Department, and because I construe the statute differently, I am constrained not to follow the prior decision on the other coupons.

Judgment will be allowed only for the sum of twenty-five dollars per coupon. Settle order.

[fol. 93] In Supreme Court of New York, Appellate Division, First Department

Index No. 24334—1937

Zurich General Accident & Liability Insurance Company, Ltd., Plaintiff-Appellant,

against

Bethlehem Steel Company, Defendant-Respondent

Stipulation as to Exhibits

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the following papers need not be printed and may be omitted from the printed papers on appeal from the judgment and order in the above entitled action and that copies of each of the same may be handed up to the Court on the argument of the appeal [or of any subsequent appeal herein]* and may be referred to in briefs and arguments with the same force and effect as though formally included in the printed papers on appeal: M. O. O. B.

1. So much of Exhibit A, annexed to the affidavit of A. Sprecher, sworn to on July 29, 1936, in support of motion for summary judgment, as consists of a copy of an exempli-
[fol. 94] fied certificate, in the German language, of protest for nonpayment of coupons presented on behalf of the plaintiff.

2. So much of Exhibit A, annexed to the affidavit of J. Hunsperger, sworn to September 9, 1936, in support of motion for summary judgment, as consists of a copy of an exemplified certificate, in the German language, of protest for non-payment of coupons presented on behalf of the plaintiff.

3. The Mortgage Indenture dated February 16, 1910 from Lackawanna Steel Company to Union Trust Company of New York, securing the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company payable March 1, 1950.

4. The printed papers on appeal in Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem

[* Matter enclosed in brackets, struck out in copy.]

Iron & Steel Corporation, Index No. 12479-1936 handed up to the Court upon the argument of the motion for summary judgment and referred to in the affidavit of Redmond F. Kernan, Jr., sworn to September 23, 1937.

5 Exhibit A, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, in opposition to motion for summary judgment, consisting of a photostatic copy of a specimen form front and back of a thousand dollar Lackawanna Steel Company First Consolidated Mortgage 5% Gold Bond, Series A, of 1950.

6 Exhibit B, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, consisting of a photostatic [fol. 95] copy of the form of front and reverse side of the second page of coupons appurtenant to the form of Bond contained in Exhibit A.

Dated January 4, 1938

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

So Ordered. —— ——, F. M.

[fol. 96] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the Notice of Appeal, Order and Judgment appealed from, and all of the papers used on the motion and now on file in the Office of the Clerk of the County of New York. Certification thereof by the Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, March 16, 1938.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

[fol. 97] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIR:

Please take notice that the plaintiff above named hereby appeals to the Court of Appeals of the State of New York from the judgment in the above entitled action entered in the office of the Clerk of the County of New York on the 19th day of July, 1938, which was entered upon an order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on the 17th day of June, 1938, which order, two justices dissenting, affirmed the judgment of the Supreme Court in the above entitled action entered in the Office of said Clerk of New York County on or about the 16th day of December, 1937.

Please take further notice that the plaintiff appeals from each and every part of said judgment of the said Appellate [fol. 98] Division of the Supreme Court and from the whole thereof.

Dated July 21st, 1938.

Yours, etc., Miller, Owen, Otis & Bailly, Attorneys for Plaintiff, No. 15 Broad Street, New York, N. Y.

To Archibald R. Watson, Esq., The Clerk of the County of New York. Messrs. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant, 15 Broad Street, New York, N. Y.

IN SUPREME COURT OF NEW YORK

JUDGMENT APPEALED FROM

Plaintiff having appealed to the Appellate Division of the Supreme Court for the First Judicial Department from the judgment entered herein in the office of the Clerk of the County of New York on the 16th day of December, 1937, adjudging that the plaintiff have judgment against defendant Bethlehem Steel Company, a Pennsylvania corporation,

in the sum of $36,375, and that the plaintiff's complaint be dismissed as against said defendant in respect to the plaintiff's claim of its right to receive payment of 129.50 Swiss [fol. 99] francs for each coupon subject of this action and in respect to its claim for damages in dollars in excess of $25 for each of said coupons; and from the order entered the 9th day of December, 1937, upon which said judgment is based (except from so much of said order as directs the severance of the action as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company) and said Appellate Division having made an order and judgment dated June 17, 1938, affirming said judgment, and said order so far as appealed from, with costs on appeal to the respondent (two of the justices dissenting in part) and the remittitur of said Appellate Division having been filed in the office of the Clerk of the County of New York on the 21st day of June, 1938, it is

Adjudged that said judgment entered herein on the 16th day of December, 1937, and said order entered herein on the 9th day of December, 1937 so far as appealed from, be, and are hereby, in all respects affirmed with costs on appeal to said defendant Bethlehem Steel Company, and it is

Further adjudged that defendant Bethlehem Steel Company, a Pennsylvania corporation, of 25 Broadway, New York City, recover of Zurich General Accident & Liability Insurance Company, Ltd., of Zurich, Switzerland, plaintiff, the sum of $164.45, costs on said appeal as taxed, and that said defendant have execution therefor.

Judgment entered this 19th day of July, 1938.

Archibald R. Watson, Clerk.
(Seal.)

[fol. 100] In Supreme Court of New York, Appellate Division

Order of Affirmance on Appeal from Judgment—June 17, 1938

Present: Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Irwin Untermyer, Hon. Albert Cohn, Hon. Joseph M. Callahan, Justices.

[Same Title]

An appeal having been taken to this Court by the plaintiff from an order of the Supreme Court, New York County,

entered on the 9th day of December, 1937, granting plaintiff's motion for summary judgment against the defendant, except so much of said order as directs that this action be severed as against the defendants Lackawanna Steel Company and Bethlehem Iron Mines Company, and from the judgment entered thereon on the 16th day of December, 1937.

And said appeal having been argued by Mr. Nathan L. Miller of counsel for the appellant, and by Mr. William D. Whitney of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered and adjudged that the order, so far as appealed from, and the judgment, be and the same are hereby affirmed; and that the respondent recover of the appellant the costs of this appeal. Two of the Justices dissenting in part.

Enter.

J. O'M.

[fol. 101] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

MEMORANDUM DECISION

Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Steel Company. Order so far as appealed from, and the judgment entered thereon, affirmed with costs. No opinion.

(Untermyer and Callahan, JJ., dissenting in part.)

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

DISSENTING OPINION OF UNTERMYER, J.

UNTERMYER, J. (dissenting in part):

I dissent in part and vote to reverse the order and judgment appealed from in so far as they limit the plaintiff's recovery, and grant judgment for the relief demanded in the complaint, for the reasons stated by Judge Hand in the opinion of the Circuit Court of Appeals, Second Circuit, in Anglo-Continentale Treuhand A. G. *v.* St. Louis Southwestern Ry. Co., 81 F. (2d) 11 (certiorari denied Henwood, Trustee, *v.* Anglo-Continentale Treuhand A. G.,

298 U. S. 655). In addition, in our opinion, the prior judgments are res adjudicata as to those coupons now sued on which were detached from the forty bonds involved in the prior suits.

Callahan, J., concurs.

[fol. 102] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

Redmond F. Kernan, Jr., being duly sworn, deposes and says: I am an attorney-at-law associated with Miller, Owen, Otis & Bailly, attorneys for the plaintiff-appellant herein, and I am familiar with the proceedings had upon the appeal to the Appellate Division in this action. No opinion was rendered by the majority of the Appellate Division in affirming the judgment herein other than the above memorandum decision. The dissenting opinion was written by Untermyer, J. and concurred in by Callahan, J.

Redmond F. Kernan, Jr.

Sworn to before me this 23rd day of July, 1938. Anthony J. Musacchio, Notary Public. Kings Co. Clk's No. 19, Reg. No. 119. N. Y. Co. Clk's No. 86, Reg. No. 0 M 86. Queens Co. Clk's No. 132, Reg. No. 1006. Commission Expires March 30, 1940. (Seal.)

[fol. 103] IN COURT OF APPEALS OF NEW YORK

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Plaintiff-Appellant,

against

BETHLEHEM STEEL COMPANY, Defendant-Respondent.

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the following papers need not be printed and may be omitted from the record on appeal from the judgment in the above entitled action and that copies of each of the same may be

handed up to the Court on the argument of the appeal and may be referred to in briefs and arguments with the same force and effect as though formally included in the record on appeal:

1. So much of Exhibit A, annexed to the affidavit of A. Sprecher, sworn to on July 29, 1936, in support of motion for summary judgment, as consists of a copy of an exemplified certificate, in the German language, of protest for non-payment of coupons presented on behalf of the plaintiff.

2. So much of Exhibit A, annexed to the affidavit of J. Hunsperger, sworn to September 9, 1936, in support of motion for summary judgment, as consists of a copy of an [fol. 104] exemplified certificate, in the German language, of protest for non-payment of coupons presented on behalf of the plaintiff.

3. The Mortgage Indenture dated February 16, 1910 from Lackawanna Steel Company to Union Trust Company of New York, securing the First Consolidated Mortgage Gold Bonds of Lackawanna Steel Company payable March 1, 1950.

4. The printed papers on appeal in Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Iron & Steel Corporation, Index No. 12479-1936 handed up to the Court upon the argument of the motion for summary judgment and referred to in the affidavit of Redmond F. Kernan, Jr., sworn to September 23, 1937.

5. Exhibit A, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, in opposition to motion for summary judgment, consisting of a photostatic copy of a specimen form front and back of a thousand dollar Lackawanna Steel Company First Consolidated Mortgage 5% Gold Bond, Series A, of 1950.

6. Exhibit B, annexed to the affidavit of William J. Brown, sworn to September 17, 1937, consisting of a photostatic copy of the form of front and reverse side of the second page of coupons appurtenant to the form of Bond contained in Exhibit A.

Dated, July 23, 1938.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

[fol. 105] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the Notice of Appeal to the Court of Appeals, the Judgment of the Appellate Division appealed from, the Order of Affirmance, the Memorandum Decision, the Dissenting Opinion, and all the papers upon which the Court below acted in making the Order and the Judgment appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof by the said Clerk is hereby waived.

Dated July 23, 1938.

Miller, Owen, Otis & Bailly, Attorneys for Plaintiff-Appellant. Cravath, deGersdorff, Swaine & Wood, Attorneys for Defendant-Respondent.

[fol. 106] IN COURT OF APPEALS OF NEW YORK

No. 430-A

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Appellant,

against

BETHLEHEM STEEL COMPANY, Respondent.

OPINION

O'BRIEN, J.:

March 1, 1910 Lackawanna Steel Company, predecessor of defendant Bethlehem Steel Company issued a series of gold bonds payable March 1, 1950 in United States Gold in the sum of $1,000 and also in pound sterling at £205.15.2, guilders at 2480, marks at 4200 and francs. If paid in francs in France, Belgium or Switzerland, the corporation promised to pay 5,180 francs and interest in the respective currencies. Each coupon contained a promise that, if paid in France, Belgium or Switzerland, the corporation would pay 129.50 francs for each six months interest, and that they were payable not only at New York, but at London, Frank-

fort, Amsterdam, at Basel and Zurich at Schweizerische Kreditanstalt.

Plaintiff, a Swiss corporation having its principal place of business in Switzerland, purchased 323 of these bonds. On July 16, 1936 it presented 1,132 coupons at Schweizerische Kreditanstalt at Zurich and demanded payment at [fol. 107] the rate of 129.50 Swiss francs or an aggregate of 146,594 Swiss francs and on September 7, 1936 it presented at the same place 323 coupons for payment at the same rate or an aggregate of 41,828.50 Swiss francs. On both occasions payment in these amounts of Swiss francs was refused. The allegations in the complaint are that on July 15, 1936 the market value of 146,594 Swiss francs in Zurich was $48,009.54 in lawful money of the United States and that on September 7, 1936 the value of 41,828.50 francs was $13,631.90. The relief demanded in the complaint is judgment for $61,766.04 with interest. Judgment has been rendered in favor of plaintiff only for the sum of $36,375 and its complaint was dismissed in respect to its claim of right to receive 129.50 Swiss francs for each coupon. Such judgment resulted upon the theory that plaintiff is not entitled to receive more than the value in United States currency of present legal tender reduced by reason of the Joint Resolution of Congress June 5, 1933.

The question is whether, on the facts of this case, the Joint Resolution is applicable to this obligation to pay foreign currency to a foreign corporation in a foreign country. The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit in Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Ry. Co., 81 Fed. (2nd) 11 (1936) wherein the facts were the same at bar except that payment was made in guilders at Amsterdam instead of francs at Zurich. That court decided that damages recoverable in dollars were required to be calculated at gold par of the guilder and not [fol. 108] at the rate of exchange prevailing in New York at the time of the judgment.

On the facts of this case, the obligation was not payable in "money of the United States" but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.

The judgment of the Appellate Division and that of the Trial Term should be reversed and plaintiff's motion for summary judgment granted with costs in all courts.

[fol. 109] IN COURT OF APPEALS OF NEW YORK

No. 430-A

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Appellant,

against

BETHLEHEM STEEL COMPANY, Respondent.

MEMORANDUM

FINCH, J. (Dissenting):

To restrict the phrase "obligation payable in money of the United States" so as to exclude a bond, if in addition, for convenience of foreign bondholders, it also provides for payment in what was meant to be an equivalent amount in Swiss francs, guilders or other foreign currency, would seem to be unduly narrowing a resolution which by its language indicated that it was of the broadest scope. A reading of the joint resolution shows it to be a resolution not only broad in scope, but one referring to an obligation as a whole rather than to any particular provisions contained therein (Norman v. B. & O., 294 U. S. 240; Perry v. U. S., 303 U. S. 330).

Furthermore, a detailed analysis of the language used would seem to show that the ordinary meaning of the language would reach and apply to every obligation issued before or after the 5th of June, 1933, capable of being paid in the United States. Every such obligation shall be dis-[fol. 110] charged upon payment dollar for dollar in any coin or currency which at the time of payment is legal tender for public and private debts. While the first sentence of the resolution considers the obligation as a whole, and strikes down the gold clause, the next sentence provides in the most sweeping language for every obligation which is capable of being paid or may be paid in money of the United States. This language of the joint resolution does not exclude a bond payable in money of the United States because such a bond also contains a provision as a matter of convenience for the payment of the same amounts in foreign

currencies. An obligation which is payable in money of the United States is no whit less such an obligation because it also gives the obligee the right to receive the equivalent of this money in foreign currency.

The obligations in suit are certainly capable of being paid in money of the United States, which brings them within the terms of the Joint Resolution. As such they are dischargeable, dollar for dollar in legal tender.

When we consider that the Joint Resolution precludes a Court of the United States from enforcing a gold clause provision, we are forced to the conclusion that such Courts may not enforce similar provisions of coupons having the same effect.

The intent of Congress being manifest, to strike down gold clause provisions and any other obstructions to its currency policy, it would seem to follow that all similar provisions contained in the principal obligation should be likewise invalid, to the end that a uniform parity should exist as to all obligations which are capable of being paid in dollars.

The judgment appealed from should be affirmed, with costs.

[fol. 111] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of January in the year of our Lord one thousand nine hundred and thirty-nine, before the Judges of said Court.

Witness: The Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

Zurich General Accident & Liability Insurance Company, Ltd., Appellant,

against

Bethlehem Steel Company, Respondent.

Remittitur—January 12, 1939

Be is remembered, That on the 26th day of July in the year of our Lord one thousand nine hundred and thirty-

eight, Zurich General Accident & Liability Insurance Company, Ltd., the Appellant, in this cause, came here unto the Court of Appeals, by Miller, Owen, Otis & Bailly, its attorneys, and filed in the said Court a Notice of Appeal and [fol. 112] return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Bethlehem Steel Company, the Respondent in said cause, afterwards appeared in said Court of Appeals by Cravath, de Gersdorff, Swaine & Wood, its attorneys.

Which Said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Nathan L. Miller, of counsel for the appellant, and by Mr. Frederick H. Wood, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are reversed and plaintiff's motion for summary judgment granted with costs in all courts.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgments be reversed and plaintiff's motion for summary judgment granted with costs in all courts, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to [fol. 113] be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals

Clerk's Office, Albany, January 12, 1939

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court

of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal of State of New York, Court of Appeals.)

[fol. 114] In Supreme Court of New York, County of New York

Present: Honorable Aaron J. Levy, Justice.

Zurich General Accident & Liability Insurance Company, Ltd., Plaintiff;

against

Bethlehem Steel Company, Defendant

Order on Remittitur—January 13, 1939

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Department, in the office of the Clerk of the County of New York on the 19th day of July, 1938, affirming the judgment in favor of the defendant and against the plaintiff heretofore entered herein in the office of the said Clerk on the 16th day of December, 1937, granting judgment in favor of the plaintiff and against the defendant only in the sum of $36,375 and dismissing the complaint in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon subject of this action and in respect [fol. 115] to its claim for damages in dollars in excess of $25 for each of said coupons, and from each and every part of said judgment of affirmance and order of affirmance as well as the whole thereof; and said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the judgment so appealed from as aforesaid and that of the Trial Term be reversed and plaintiff's motion for summary judgment granted with costs in all Courts, and having ordered and adjudged that the proceedings herein be remitted to this Supreme Court, there to be proceeded upon according to law;

Now on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Miller, Owen, Otis & Bailly, attorneys for the plaintiff herein, it is hereby

Ordered, that the said order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

A. J. L., J. S. C.

[fol. 116] In Supreme Court of New York, New York County

Zurich General Accident & Liability Insurance Company, Ltd., Plaintiff,

against

Bethlehem Steel Company, Defendant

Judgment

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Department, in the office of the Clerk of the County of New York on the 19th day of July, 1938 affirming the judgment in favor of the defendant and against the plaintiff heretofore entered herein in the office of the said Clerk on the 16th day of December, 1937, granting judgment in favor of the plaintiff and against the defendant only in the sum of $36,375 and dismissing the complaint in respect to the claim of the plaintiff of its right to receive payment of 129.50 Swiss francs for each coupon subject of this action and in respect to its claim for damages in dollars in excess of $25 for each of said coupons, and from each and every part of said judgment of affirmance and order of affirmance as well as the whole thereof; and the said appeal having been duly argued at [fol. 117] the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be reversed and plaintiff's motion for summary judgment granted with costs in all courts; and having ordered and adjudged that the proceedings herein be remitted to this Supreme Court there to be proceeded upon according to

law; and the remittitur from the said Court of Appeals having been filed herein, and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now, on motion of Miller, Owen, Otis & Bailly, attorneys for the plaintiff herein, it is hereby

Ordered and adjudged that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

Ordered and adjudged that the said judgments entered herein on the 19th day of July, 1938 and the 16th day of December, 1937 be and the same hereby are reversed; and it is further

Ordered and adjudged that the plaintiff's motion for summary judgment is granted with costs in all courts; and it is further

Ordered and adjudged that the plaintiff Zurich General Accident & Liability Insurance Company, Ltd., of Zurich, Switzerland, have judgment against the defendant Beth-
[fol. 118] lehem Steel Company, a Pennsylvania corporation having an office at 25 Broadway, City and State of New York, in the sum of $61,766.04 together with the sum of $7,035.61, being interest on $48,134.14 from July 15, 1936, and together with the sum of $1,942.55, being interest on $13,631.90 from September 7, 1936, and together with the sum of $722.13, costs as taxed, making an aggregate sum of $71,466.33, and that the plaintiff have execution therefor.

Judgment signed and entered this 13th day of January, 1939.

Archibald R. Watson, Clerk. (Seal.)

[fol. 119] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 120] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 16, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted and the case is assigned for argument immediately following No. 495.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 43,075. New York Supreme Court. Term No. 590. Bethlehem Steel Company, petitioner, vs. Zurich General Accident & Liability Insurance Company, Limited. Petition for a writ of certiorari and exhibit thereto. Filed January 13, 1939. Term No. 590, O. T., 1938.